83-731

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ADOLF KIZAS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether the Director of the Federal Bureau of Investigation, having recruited employees on the basis of a long-standing program which the Director was authorized to establish and which guaranteed those employees preferential treatment in the process by which Special Agents were selected in exchange for three years of service at a grade level below that for which their education and experience qualified them, could deny the benefits of the program to persons who had already entered on duty in reliance on the program without providing just compensation.

Whether §717 of the Civil Rights Act of 1964, as amended, which provides a remedy for federal employment discrimination, precludes federal employees from maintaining a cause of action under the Fifth Amendment for the denial of equal protection of the laws, where the rights provided by the statute afford less substantive protection than the rights guaranteed by the Constitution.

PARTIES

Defendants-appellants below were the United States of America, William H. Webster and Clarence Kelley.

Plaintiffs-cross-appellants below were certified as a class pursuant to Rule 23(b)(1) of the Federal Rules of Civil Procedure. The class was defined as:

> those members of the FBI clerical and support staff who were employed prior to April 19, 1977 and who (a) were interested in positions as Special Agents, and (b) understood, as a condition of their employment, that once they satisfied minimum requirements for the Special Agent position they would be given preferential consideration for future Special Agent positions.[1]

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[1] Persons known to be members of the class as of the date of the judgment in the district court are identified in Appendix F.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, not yet reported, appears as Appendix A. There were three opinions issued by the United States District Court for the District of Columbia. The first, granting summary judgment against defendants as to liability, is reported at 492 F. Supp. 1135, and appears as Appendix B. The second, dismissing plaintiffs' discrimination claim and allowing plaintiffs to add the

United States as a defendant is also reported at 492 F. Supp. 1135, and appears as Appendix C. The third, awarding damages to certain plaintiffs, is unreported and appears as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on April 26, 1983. *See* Appendix A. Petitioners filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, which was denied on August 5, 1983. *See* Appendix E. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

Section 717 of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16, appears, in pertinent part, in Appendix G.

STATEMENT OF THE CASE

This case arises out of certain modifications to a long-standing program employed by the Federal Bureau of Investigation for the appointment of Special Agents. For many years prior to April 19, 1977, the FBI maintained a

selection process which consisted of five qualifying programs. App. B, p. 47a. One of these programs, the "modified" program, allowed persons who had completed four years of college and accumulated three years of professional, executive, complex investigative or other specialized experience to qualify for appointment as Special Agents. App. B, pp. 47a-48a. The critical elements of the modified program, from petitioners' perspective, were that the Bureau regarded service as an FBI clerical employee as equivalent to other specialized experience, whereas clerical experience outside the Bureau was not so regarded, App. B, p. 47a, and that FBI clerical employees were assigned a chronological ranking as soon as they satisfied the threshold requirements for selection, while non-Bureau participants in the modified program were not. App. B, pp. 51a-52a. Selections of Special Agents from the modified program were made in accordance with the chronological rankings of the applicants. App. B, p. 51a. These elements of the modified program were of substantial benefit to petitioners, assuring them that they would be considered for appointment, in chronological order, after meeting certain objective threshold requirements. App. B, p. 52a.

Although the clerk-to-agent program was never codified by regulation, its policy was generally known throughout the Bureau. App. B, pp. 50a, 65a. Special Agents in field offices were directed to and did recruit clerical employees by describing the program as a job related benefit. App. B, p. 53a.[1] Changes in the program were made by official memoranda, App. B, p. 50a, and, on at least two

[1] The Bureau was aware that many persons accepted clerical positions in express reliance on the program, App. B, pp. 54a-55a, and, once these individuals joined the Bureau, their reliance on this policy was actively reinforced. App. B, pp. 53a, 61a.

occasions, were implemented only prospectively. App. B, pp. 53a-54a, 61a.

The clerk-to-agent program afforded the Bureau significant benefits, allowing it to select Special Agents from the applicant pool on short notice, to appoint persons already trained in the ways of the Bureau, to employ as clerks persons who were more highly motivated and better educated than would otherwise have been the case, and to obtain the services of such persons at low wages. App. B, pp. 52a, 54a, 57a, 61a.[2]

The district court found that respondents were aware that many clerical employees accepted employment in reliance on the clerk-to-agent program. App. B, p. 54a. Petitioners gave valuable consideration by accepting menial positions, lower in challenge, pay levels and status than their education and experience qualified them for, in order to qualify for Special Agent positions through the program. App. B, pp. 54a, 57a, 71a.

On April 19, 1977, petitioners were advised that the Bureau was establishing a New Special Agent Selection System ("NSASS") which, *inter alia*, eliminated the chronological ranking system for clerical employees. App. B. p. 48a. Applicants who achieved a pre-determined minimum test score for the relevant selection category were placed in a pool from which selections were made. App. B, p. 48a. Scoring better than the minimum cut-off score did not guarantee that applicants would be considered for appointment, however, due to the absence of chronological ranking.

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[2] The clerks were especially useful to the Bureau, which by its own admission, had a "dire" need for more clerical employees throughout this period. App. B, p. 56a.

At some time thereafter, the Bureau added two qualifying programs to its Special Agent selection process, one each for minorities and females. App. B, p. 58a. Although the minimum qualifying test scores for each selection category were periodically adjusted, the qualifying score for the modified group was always the highest, App. B, p. 59a, while the scores for women and minorities were always the lowest of all the selection categories. The acknowledged purpose of this differential test scoring was to obtain a 50% ratio of women and minorities within each Special Agent class, at a time when the job related needs of the Bureau were in the areas of law and accounting.

Petitioners filed suit on May 31, 1978,[3] charging that the revocation of the preference afforded clerical employees under the former clerk-to-agent program violated due process of law, as guaranteed by the Fifth Amendment.[4] On February 15, 1980, the district court granted partial summary judgment to petitioners, finding that the termination of the clerical preference constituted a taking of property in violation of the Fifth Amendment to the Constitution of the United States. *See* Appendix B. The district court found that:

> *This preference was a valuable—perhaps the most valuable—benefit pertaining to those positions.* It was a well-known part of a common-law of FBI employment, understood by the defendants and fostered

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[3] The complaint was later amended to include a claim that the FBI's differential test scoring violated petitioners' Fifth Amendment rights to be free from discrimination.

[4] Jurisdiction was originally based on 28 U.S.C. §1331(a). The complaint was later amended to allege jurisdiction under the Tucker Act, 28 U.S.C. §1346(a)(2).

> by their representations to the plaintiffs both as inducements to accept clerical positions and, during plaintiffs' service, by FBI statements of promotion policy. It was understood and recognized at all levels of the FBI command, and by the obvious and visible practice of two decades.

App. B, p. 65a (emphasis added). The court then concluded that:

> The policy at issue was significant both to the Bureau and to the affected employees; it was well understood and regularly used, and stood apart in character and significance from other aspects or incidents of FBI employment. It was not a mere condition of employment. *The preference was a significant element of compensation for which the Bureau received valuable service beyond what could have been received for the salary paid, but for the preference.*

App. B, p. 68a (emphasis added). The court ruled that under these circumstances, petitioners had a constitutionally protected entitlement to the preference, which the Bureau could "no more take away . . . without liability than it could refuse to pay an agreed amount of salary to one of its employees." App. B, p. 68a. The court dismissed petitioners' discrimination claim[5] as well as the action against respondents Webster and Kelley in their individual capacities.

Petitioners thereafter moved to amend their complaint to add the United States as a defendant and to allege

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[5] Both issues raised by petitioners arise under the Fifth Amendment. Parts I and II of this petition deal with the due process and takings clauses, and will be referred to as petitioners' "property claim." Part III deals with the equal protection component of the due process clause, and will be referred to as petitioners' "discrimination claim."

jurisdiction under the Tucker Act, 28 U.S.C. §1346(a)(2). Petitioners also requested the court to reconsider the dismissal of their discrimination claim. On April 25, 1980, the district court declined to alter its decision with respect to the discrimination claim and granted petitioners' motion to name the United States as a party defendant as to the property claim. *See* Appendix C.[6]

Following a second round of discovery, petitioners moved for summary judgment as to damages, which was granted on February 18, 1982. *See* Appendix D. Final judgment was entered on February 26, 1982.

Appeals and cross-appeals were filed, and on April 26, 1983, the United States Court of Appeals for the District of Columbia Circuit affirmed in part and reversed in part and remanded. *See* Appendix A. Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on August 5, 1983. *See* Appendix E.

REASONS FOR GRANTING THE WRIT

At issue in this case is whether the Director of the FBI created a vested property interest, by establishing as part of the Bureau's Special Agent selection process, a preference for certain employees, which was mutually under-

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[6] Respondents had moved that the property claim be transferred to the United States Court of Claims (now the United States Claims Court). The court directed petitioners to choose between transferring the property claims of all class members to the Court of Claims or bifurcating the class into two groups, with the district court retaining jurisdiction over only those claims of ten thousand dollars or less. Petitioners elected to bifurcate their property claims, whereby all such claims in excess of ten thousand dollars were transferred to the Claims Court. *See* Alford v. United States, No. 249-81C (Ct. Cl. filed April 17, 1981). Proceedings there are suspended, pending the outcome of this case.

stood and relied upon by both the Bureau and those employees and for which those employees gave valuable consideration not only in the form of detrimental reliance but also by accepting employment for reduced wages in exchange for guaranteed consideration in the selection process. Also at issue is whether such an interest, once established, may be retroactively revoked without making just compensation.

Review by this Court is justified in order to resolve the fundamental inconsistency in constitutional interpretation between the lower court's ruling as to the permissible origins of a property interest, and this Court's landmark decisions in *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972), which hold that a constitutionally protected "property interest" is created when the government fosters legitimate claims of entitlement either through an independent source such as statutory law, *see Roth*, 408 U.S. at 577, or through mutually explicit understandings, *see Perry*, 408 U.S. at 601. Resolution of these issues is essential not only to petitioners herein, but to present and future federal employees who must assess the reliability of explicit representations authorized to be made by federal officers in the context of the employment relationship.[7] Review by this Court is also warranted in order to address the interplay between the due process and takings clauses of the Fifth Amendment, and in particular, to determine whether constitutionally protected

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[7] The fact that this case involves the FBI raises special concerns insofar as that agency's ability to recruit the most capable law enforcement officers on the basis of valid and binding commitments will undoubtedly be impaired if the court of appeals' decision is allowed to stand.

entitlements to specific employment benefits, which are legitimately created and for which value is given, give rise to claims for just compensation upon their revocation.

I.

REVOCATION OF THE PREFERENCE ACCORDED PETITIONERS IN THE FBI'S SPECIAL AGENT SELECTION PROCESS WAS A TAKING OF PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT

The court of appeals rejected petitioners' property claim on the ground that the benefit derived from the clerical preference was not specifically authorized by Title 5 of the United States Code, which it concluded was the exclusive basis for all federal employees' benefits, and that it could therefore not amount to a vested property right.[8] Implicit in the court of appeals' reliance upon Title 5 as the source of all employee entitlements is the presumption that this Court's holding in *Perry*, that a property interest can be created by a mutual understanding between employer and employee, does not apply to federal employees. *Cf. Ashton v. Civiletti*, 613 F.2d 923 (D.C. Cir. 1979); *Colm v. Vance*, 567 F.2d 1125 (D.C. Cir. 1977). That presumption largely eviscerates the holding of *Perry* by ignoring the alternate means by which property interests may be created.

The question is not whether the specific entitlement, for which constitutional protection is claimed, is specifically created by legislative enactment, but rather, whether

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[8] Although this case arises in the context of federal employment, it is unlike other decided cases in that field. It does not present the question of rights to appointment, *cf.* National Treasury Employees Union v. Reagan, 663 F.2d 239 (D.C. Cir. 1981), rights to continued employment, *cf., e.g.*, Army and Air Force Exchange Service v. Sheehan, 456 U.S. 728 (1982), or rights to promotion, *cf., e.g.*, Applegate v. United States, 211 Ct. Cl. 380 (1975).

it was in fact created, and whether its creation was authorized by, and is consistent with, federal law. The court of appeals' analysis is not unlike the argument which this Court rejected one hundred fifty years ago in *United States v. MacDaniel*, 32 U.S. (7 Pet.) 1 (1833). There, the government sought to recover commissions paid to a Navy clerk on the ground that there was no statute which authorized the clerk's appointment for the specific duty for which the commissions were paid. 32 U.S. at 14. The Court rejected the government's argument, stating:

> [T]he head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does . . . . To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject . . . . Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a respective effect, but must be limited to the future.

Id. at 14-15. In the instant case, the court of appeals overlooked the relevant inquiry, which was whether the Director was authorized to create the rights which petitioners now seek to enforce. As to that, there is no dispute that the Director was authorized by law to create the clerk-to-agent program and to make the representations which petitioners seek to enforce. *See* 28 U.S.C. §536; 28 C.F.R. §0.137.[9]

[9] The government does not dispute that the Director had authority to establish the clerk-to-agent program and to make the

[footnote continued]

Simply because the district court and petitioners refer to the clerk-to-agent program as a form of compensation for the reduced grade which petitioners accepted, does not mean that the program was the kind of "compensation" requiring specific statutory authorization in Title 5. As the court recognized, the incidents of employee compensation governed by Title 5 are "basic salaries; salary increases; overtime, holiday and sick pay; life and health insurance benefits; retirement benefits; travel and subsistence allowances; and compensation for injury and unemployment." App. A, p. 20, *citing*, 5 U.S.C. §§5301 *et seq.* Title 5 applies to compensation requiring "disbursement of public money" and "appropriation[s] therefor." 5 U.S.C. §5536.

The court of appeals begs the question by asserting that petitioners cannot demonstrate that the preference was an element of compensation. The district court found that: 1) the program established by the Bureau created mutual understandings, App. B, pp. 65a-67a; 2) petitioners were intentionally placed in lower GS positions than they would have been given but for the preference, App. B, p. 54a; 3) petitioners accepted the clerical positions in express reliance on the clerk-to-agent program, App. B, pp. 54a-55a, 61a; and 4) the govern-

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representations upon which petitioners rely. Indeed, respondents first argued that the case should be dismissed because the Director had plenary authority to appoint Special Agents in any manner he chose. Respondents argued later that no property interest could exist because there was no explicit statement by the Bureau that the preference would continue indefinitely into the future. This argument was considered and rejected by the district court, which held that respondents' conduct "gave plaintiffs every reason to suppose that the preference would continue, and was entirely consistent with the conclusion that the defendants also so understood the policy." App. B, p. 61a.

ment received the benefit of petitioners' labor, App. B, p. 61a.[10] Based upon these facts, the district court concluded that petitioners had a vested right to the chronological ranking within the modified program, in part because it was "a significant element of compensation for which the Bureau received valuable service beyond what could have been received for the salary paid, but for the preference." App. B, p. 68a.

The fact that the form of compensation here was nonmonetary should not be interpreted to diminish its significance or to alter petitioners' right to it.[11] The district court, having found as a matter of fact that the preference was perhaps the most significant element of compensation provided petitioners, and this fact not being in conflict with principles of federal employment law, petitioners are entitled to recover the value of services already performed. *See United States v. Larionoff*, 431 U.S. 864, 879 (1977); *United States v. Testan*, 424 U.S. 392, 401-402 (1976); *United States v. MacDaniel*, 32 U.S. (7 Pet.) 1, 14 (1833).

Although a federal employee's rights are limited by the holding of *United States v. Testan*, that an employee is not entitled to the benefit of a position until he has been duly appointed to it, that doctrine is inapplicable. The preference was clearly a benefit which attached to the job

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[10] No case cited as similar by the court of appeals involved this set of *proven* circumstances.

[11] The court of appeals' conclusion might be appropriate where a federal officer acts *ultra vires* in creating an expectation involving public moneys, as where an appointee is promised more than the salary schedules allow. *Cf.* 5 U.S.C. §5536. It has no application, however, where the officer was authorized to create an entitlement which does not involve the expenditure of public funds.

of FBI clerical employees, and federal employees are entitled to the emoluments of their positions until they are legally disqualified. *See United States v. Wickersham*, 201 U.S. 390 (1906).

II.

A MUTUALLY EXPLICIT UNDERSTANDING, WHICH GIVES RISE TO A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IS "PROPERTY," WHICH CANNOT BE TAKEN AWAY WITHOUT PROVIDING JUST COMPENSATION

The criteria for establishing a constitutionally recognized property interest having been met, petitioners cannot be denied compensation for the deprivation of such interest on the ground that the constitutional protection is purely procedural. Although the Fifth Amendment contains two separate clauses which ensure against deprivations without due process and takings without just compensation, this Court has never intimated that the characterization of property differs for purposes of the two types of protection. To the contrary, the two clauses have had a close association throughout history,[12] and the types of property for which compensation is required upon taking has always been broadly construed.[13]

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[12] *See, e.g.*, Magna Carta, ch. 39 (1215); 28 Edw. III, c. 3 (1354); Coke, Institutes of the Laws of England, Part II (London 1641).

[13] Compensation has been required for the taking of such intangible interests as franchises, *see* Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893), patent rights, *see* William Cramp & Sons Ship & Engine Bldg. Co. v. Int'l Curtis Marine Turbine Co., 246 U.S. 28 (1918), and rights of way, *see* Western Union Telegraph Co. v. Pennsylvania R.R. Co., 195 U.S. 540 (1904).

"[A] physical takeover of a distinct entity, with an accompanying transfer of the legal powers of enjoyment and exclusion that are typically associated with rights of property," are the traditional measures of a compensable taking. *See* Tribe, *American Constitutional Law*, §9-3 (1978) (footnotes omitted). Our notion of the legal interests which rise to the level of property for purpose of the Fifth Amendment has undergone a major transformation since *Roth*, requiring that we expand, as well, our ability to conceive of takings. "The body of rules determining which expectations constituted compensable property interests and which do not, plainly requires reconsideration in light of the broader definition of property interests now employed in the law of procedural due process. There seems no good reason why the broader definition should not be extended to the takings context." *Id.* at §9-2 n. 11. Nor does the court of appeals provide any such reason.

In concluding that petitioners were not entitled to compensation for the termination of their preference in the selection process, the court of appeals relied upon cases in which this Court upheld congressional authority to alter various forms of statutory entitlements. *E.g.*, *Flemming v. Nestor*, 363 U.S. 603 (1960); *Richardson v. Belcher*, 404 U.S. 78 (1971). Neither case supports the conclusion reached by the court of appeals, *i.e.*, that there is a distinction between a legitimate claim of entitlement and property protected by the takings clause.[14]

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[14] *Flemming* and *Richardson* were decided before *Roth* and *Perry*. It can hardly be said, therefore, that they were ever intended to address rights whose derivation had not even been recognized at the time.

Both *Flemming* and *Richardson* dealt with claimed rights to social security payments. In *Flemming*, this Court upheld the statutory suspension of certain social security disbursements, finding that there was no accrued interest in such payments. Because Congress had, within the Social Security Act itself, *expressly* reserved the right to amend or repeal the Act, the Court concluded that any expectation of continued benefits could not have been either mutual or legitimate.[15] Far from sanctioning retroactive revocation of mutually explicit understandings, the Court specifically observed that Congress was *not* "free of all constitutional restraint" in modifying the statutory scheme. 363 U.S. at 611.

Neither *Richardson* nor *Flemming* is dispositive of the issue presented here for two reasons. First, petitioners' challenge is not to the authority of the Director to remove the underlying entitlement, but to his power to do it retroactively, and without compensation, after rights had vested by virtue of consideration being given. Second, this case *does not* involve "social welfare." The Court's rationale in *Richardson* was as follows:

> [T]he analogy drawn in *Goldberg* [*v. Kelly*, 397 U.S. 254 (1970)] between social welfare and 'property,' . . . cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.

404 U.S. at 81. The rights claimed in the instant case are unlike social welfare benefits, which are deemed govern-

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[15] The district court in the instant case found that there were no disclaimers or reservations that would put petitioners on notice that the benefits of the clerk-to-agent program might be revoked, App. B, pp. 56a, 69a, and concluded that petitioners' expectations were legitimate and mutual. App. B, pp. 65a-66a.

ment largesse, gratuitously conferred, and often explicitly subject to congressional qualification. As such, they may be redistributed or withdrawn at any time for any non-arbitrary reason without giving rise to a claim for compensation. *See, e.g., United States ex rel. Burnett v. Teller*, 107 U.S. 64 (1883). The interest here, however, was not unilaterally conveyed, but was *earned* by petitioners, who States Code is ill-conceived. Although the United States *Washington,* District of Columbia policemen brought suit

Petitioners' claim for compensation cannot be avoided on grounds of sovereign immunity. The court of appeals' conclusion that petitioners' claim is foreclosed due to the absence of an explicit waiver in Title 5 of the United States Code is ill-conceived. Although the United States is immune from suit except as it consents to be sued, *see United States v. Sherwood*, 312 U.S. 584 (1941), the Tucker Act provides such consent for "any claim against the United States . . . founded . . . upon the Constitution . . . ." 28 U.S.C. §1346. *See United States v. Mitchell*, 51 U.S.L.W. 4999, 5001-5003 (U.S. June 27, 1983). As noted above, the sources of petitioners' substantive rights are the statutes which authorized the FBI Director to create the clerk-to-agent program, the explicit representations made pursuant thereto, and the Constitution itself, which prohibits the taking of property without just compensation. It is the Fifth Amendment itself which "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Eastport Steamship Corp. v. United States*, 372 F.2d 1002

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[16] The undisputed evidence is that participants in the clerk-to-agent program were intentionally assigned grades "below that [for] which their education and experience would ordinarily have qualified them." App. B, p. 57a.

(Ct. Cl. 1967), *quoted in, United States v. Mitchell*, 51 U.S.L.W. at 5002. Moreover, petitioners here sue for "money improperly exacted or retained," *see United States v. Testan*, 424 U.S. 392, 401 (1976), by virtue of the government's acceptance of petitioners' labor and subsequent failure to pay full compensation.

The constitutional protections recognized and applied by this Court should not be denied where a federal officer, indisputably acting within the scope of his authority, initiates a program which is mutually understood to provide a significant element of compensation, and upon which federal employees rely. Nor should those employees be denied compensation for the revocation of that program, after they gave valuable consideration, on the ground that the benefit was non-monetary and therefore not "compensation."

III.

FEDERAL EMPLOYEES ARE NOT BARRED FROM OBTAINING A REMEDY FOR EMPLOYMENT DISCRIMINATION DIRECTLY UNDER THE FIFTH AMENDMENT

This case presents the issue, never previously before this Court, of whether §717 of the Civil Rights Act, 42 U.S.C. §2000e-16, which establishes a remedy for federal employment discrimination, impliedly bars federal employees from asserting a cause of action directly under the Fifth Amendment, where the employees demonstrate that the statute does not fully protect their constitutional rights. The issue is deserving of resolution by this Court because the lower courts' misinterpretation of this Court's decision in *Brown v. GSA*, 425 U.S. 820 (1976), has the effect of impairing federal employees' ability to fully and adequately enforce their constitutional right to be free from discrimination in employment.

In *Brown*, a federal employee who had filed an administrative complaint and had been denied relief at the administrative level, brought an action in federal district court after the time for filing such an action under Title VII had expired. Brown based his claim on Title VII and 42 U.S.C. §1981, but not on the Fifth Amendment.[17] After concluding that Congress had been convinced in 1972 that enactment of §717 was required because federal employees had no effective remedy for employment discrimination,[18] the Court concluded that:

> [T]he Congressional intent in 1972 was to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination.

Id. at 829.

Lower federal courts have relied on *Brown*, and this Court's subsequent reference to it in *Passman*, to conclude that federal employees are barred from pursuing employment discrimination claims under the Fifth Amendment.[19] Petitioners maintain that that interpretation was never intended, that it is inconsistent with other decisions

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[17] A Fifth Amendment cause of action for employment discrimination was not recognized until three years later when this Court decided Davis v. Passman, 442 U.S. 228 (1979).

[18] The Court recognized that the accuracy of congressional understanding of the state of the law in 1972 was not relevant. 425 U.S. at 828. Davis v. Passman, 442 U.S. 228 (1979), establishes that to whatever extent congressional doubts focused on the availability of a *constitutional* remedy for employment discrimination, they were unfounded.

[19] *See, e.g.*, Gissen v. Tackman, 537 F.2d 484 (3d Cir. 1976) (*en banc*).

of this Court, and that it seriously undermines the ability of federal employees to obtain a remedy for the violation of rights guaranteed by the Constitution.

That *Brown* was intended only to bar federal employees' alternate *statutory* remedies may be gleaned in part from this Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976), rendered only six days after *Brown*. In *Washington*, District of Columbia policemen brought suit under the Fifth Amendment and 42 U.S.C. §1981, charging that certain personnel tests discriminated on the basis of race. 426 U.S. at 232. Counsel for the policemen stated that he had not raised a Title VII claim because the procedural requirements of that Act had not been met. *Id.* at 238 n. 10.[20] Nevertheless, the Court ruled on the merits of the policemen's Fifth Amendment claim. Certainly, if the Court had intended to bar federal employees covered by Title VII from pursuing a Fifth Amendment remedy, it would have said so in *Washington*.

The limited nature of this Court's ruling in *Brown* is also apparent from the decision itself. Not only was there no constitutional claim asserted or discussed, but the Court's rationale makes apparent that it was concerned only with statutory construction and not a constitutional question. For instance, in *Brown*, the Court's

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[20] The 1972 amendments to the Civil Rights Act, which added §717 to Title VII, thereby extending coverage to federal employees, had been enacted after the complaint had been filed. Although it was subsequently held that D.C. policemen are covered by §706 of the Civil Rights Act rather than §717, *see* Bethel v. Jefferson, 589 F.2d 631 (D.C. Cir. 1978), that issue was not raised in *Washington*. This Court referred to the plaintiffs as federal employees. *See* 426 U.S. at 238 n. 10. It must therefore be presumed that the Court considered the issue to be one of federal employment discrimination.

conclusion that Title VII was the exclusive remedy for federal employment discrimination was based on its determination that there was no effective waiver of sovereign immunity for such claims prior to the enactment of §717 of the Civil Rights Act in 1972. *See* 425 U.S. at 826. While that consideration was critical to the Court's conclusion that other statutes did not provide jurisdiction for employment discrimination suits against the United States, it is irrelevant to the determination of whether federal officers may be held liable under the Fifth Amendment for violating federal employees' constitutional rights.[21] *See e.g., Davis v. Passman*, 442 U.S. 228 (1979); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Where this Court has addressed the issue of whether a statutory remedy supplants a constitutional claim, it has applied a two-part test requiring consideration of whether Congress *explicitly* declared the statutory remedy to be a substitute and whether the statutory remedy is viewed *as equally effective. See Carlson v. Green*, 446 U.S. 14 (1980). The fact that the *Brown* opinion discussed neither of these factors is also indicative of the limited scope of the holding therein. Application of the *Carlson* standards to the issue here forecloses the conclusion that Title VII precludes federal employees' cause of action under the Fifth Amendment for employment discrimination.

There is absolutely no indication, either explicit or implicit, that Congress intended to bar federal employees

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[21] The Court distinguished Johnson v. Ry. Express Agency, 421 U.S. 454 (1975), which held that Title VII did not preempt alternate statutory remedies for private employment discrimination on the ground that there was no sovereign immunity issue present there.

from suing under the Fifth Amendment for job discrimination. At most, the legislative history demonstrates that Congress was uncertain as to whether such a remedy existed.[22] Any doubts expressed by Congress as to the availability of an effective remedy for federal employment discrimination prior to the 1972 amendments, were answered by this Court when it held that federal employees could maintain a Fifth Amendment cause of action to remedy employment discrimination. *See Davis v. Passman*, 442 U.S. 228 (1979).[23]

More indicative of congressional attitude toward alternate remedies is the fact that Congress has repeatedly rejected proposals to make Title VII an exclusive remedy, beginning in 1964, when the full Senate defeated such an

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[22] In *Brown*, the Court relied on the absence of specific congressional intent to establish or maintain a remedy other than Title VII for federal employment discrimination. *See* 425 U.S. at 834. *Carlson* requires, however, that Congress explicitly declare the statutory remedy to be a substitute for a constitutional claim, a consideration never discussed in *Brown*. Congressional doubt as to the availability of a remedy for federal employment discrimination, recognized by this Court in *Brown*, supports petitioners' position insofar as Congress could not have intended to preempt a remedy which it did not know existed.

[23] In *Passman*, the Court stated that:

> In *Brown v. GSA*, 425 U.S. 820 (1976) we held that the remedies provided by §717 are exclusive when those federal employees covered by the statute *seek to redress the violation of rights guaranteed by the statute*.

442 U.S. at 247 n. 26 (emphasis added). This language should not be construed to bar a federal employee's Fifth Amendment claim where the employee demonstrates that his or her substantive right to be free from discrimination is not fully protected by Title VII, even though the employee may be covered by the statute. *See* discussion *infra*, at 23-26.

amendment. *See* 110 Cong. Rec. 13650-52. When Section 717 was added in 1972, a similar amendment was defeated by the Senate, *see* 118 Cong. Rec. 3371-73, as well as the House Education and Labor Committee.[24]

Not only did Congress reject attempts to make Title VII the exclusive remedy for federal employees, it adopted the following savings provision:

> Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure non-discrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

42 U.S.C. §2000e-16(e). This provision is as explicit a statement as could have been made in 1972 that to whatever extent a constitutional tort lay against a federal officer for employment discrimination, that remedy would remain intact after enactment of §717.

The explicit and repeated repudiation by Congress of efforts to make Title VII an exclusive statutory remedy, coupled with the inclusion of an explicit savings provision, is wholly inconsistent with the conclusion that Congress intended to substitute Title VII for a Fifth Amendment remedy.

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[24] It was the House Education and Labor Committee's refusal to make §717 an exclusive remedy which prompted a minority report objecting to the deletion. *See* H.R. Rep. No. 92-238, 92d Cong., 2d Sess., *reprinted in*, 1972 U.S. Code Cong. & Ad. News 2137, 2175; Joint Explanatory Statement of Managers at the Conference on H.R. 1746 to Further Promote Equal Employment Opportunities for American Workers, 92nd Cong., 2d Sess., *reprinted in*, 1972 U.S. Code Cong. & Ad. News 2179, 2182. *See also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 n.9 (1974).

The second element of the *Carlson* test requires that the statutory substitute be equally as effective as a constitutional remedy.[25] Title VII is a less effective remedy for federal employees than the Fifth Amendment because Title VII allows both private and governmental employers to justify race and gender-based classifications on the basis of a legitimate, non-discriminatory purpose, while the Constitution prohibits the government from imposing such classifications without meeting a much higher burden.

The due process clause of the Fifth Amendment guarantees that no person shall be denied the equal protection of the laws. *See Washington v. Davis*, 426 U.S. 229, 239 (1976); *Schneider v. Rusk*, 377 U.S. 163 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954). Government classifications based on race are therefore prohibited unless necessary to achieve a compelling governmental interest, *see McLaughlin v. Florida*, 379 U.S. 184, 196 (1964), and then only if exercised in the least restrictive manner. *Accord Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 51 (1973). Gender-based classifications are acceptable only when necessary to serve important governmental objectives and when substantially related to the achievement of those objectives. *See Caban v. Mohammed*, 441 U.S. 380 (1979); *Craig v. Boren*, 429 U.S. 190,

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[25] In *Carlson*, this Court held that the availability of a remedy under the Federal Tort Claims Act, 28 U.S.C. § § 2671 *et seq.*, did not bar a prisoner from suing under the Eighth Amendment in part because the constitutional claim was directed at the individual and allowed for recovery of punitive damages. Both factors are equally applicable here, demonstrating part of the benefit of a Fifth Amendment claim vis-a-vis a Title VII claim.

197 (1976). These fundamental constitutional mandates are fully applicable to the federal government when it acts as an employer. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

The protection afforded by Title VII against racial and gender-based classifications, on the other hand, are less stringent, largely because the statute was originally applicable only to private sector employment.[26] The rights guaranteed by Title VII may be defined by reference to the elements of a cause of action under that Act, which are as follows:

> Once plaintiffs have successfully raised an inference of discriminatory conduct, the responsibility shifts to defendants to bring forth evidence that the practices at issue were established in the legitimate course of business . . . . *The employer need not prove that the practice was the wisest or most lucrative but he must bring forth evidence of its legitimacy.*

Thompson v. Sawyer, 678 F.2d 257, 284-85 (D.C. Cir. 1982) (emphasis added). Thus, intentional racial or sexual classifications in employment may be legally justified under Title VII by the demonstration of a legitimate business purpose.

When Congress added §717 in 1972, to extend coverage to federal employees, its purpose was to guarantee "the full rights available in the courts *as are granted to individuals in the private sector* under Title VII." *Chandler v. Roudebush*, 425 U.S. 840, 841 (1976) (emphasis added). *See Morton v. Mancari*, 417 U.S. 535, 546-47

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[26] The constitutional authority for the Civil Rights Act is the commerce clause; not the Fifth Amendment. *See* United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

(1974). Neither the statute nor case law thereunder distinguishes between the elements of a cause of action under §706, dealing with discrimination in the private sector, and those under §717, dealing with federal employment discrimination. *See, e.g., Valentino v. United States Postal Service*, 674 F.2d 56, 63 (D.C. Cir. 1982); *Cartagena v. Secretary of the Navy*, 618 F.2d 130, 133 (1st Cir. 1980). *Accord Smith v. State of Georgia*, 684 F.2d 729, 731 (11th Cir. 1982) (state government employees); *Coopersmith v. Roudebush*, 517 F.2d 818, 821 n. 7 (D.C. Cir. 1975) (Title VII standard of legality for job qualifications same for private and public employers). The result is that the federal government may defend a Title VII suit alleging discrimination on the basis of an inherently suspect job classification merely by demonstrating a legitimate, non-discriminatory purpose.[27]

This Court has recognized the differences between the scope of Title VII's non-discrimination mandate, and that inherent in the Constitution. In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Court distinguished between the coverage afforded under Title VI, which incorporates the non-discrimination mandate of the Fifth and Fourteenth Amendments, *see Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and Title VII. 443 U.S. at 206 n. 6. *Cf. Washington v. Davis*, 426 U.S. 229 (1976).[28] And in *Dothard v.*

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[27] Respondents have never challenged petitioners' conclusion that Title VII affords federal employees less protection than the Constitution, choosing instead to rely on *Brown* as being dispositive.

[28] Although a Fifth Amendment claim requires proof of intent, while a Title VII claim does not, *see* Washington v. Davis, 426 U.S. 229 (1976); United Steelworkers of America v. Weber, 443 U.S.

[footnote continued]

Rawlinson, 433 U.S. 321 (1977), a case relied on by the court of appeals, this Court expressly reserved ruling on whether Title VII was coextensive with the Fourteenth Amendment because the parties never asserted that "the Equal Protection Clause requires more rigorous scrutiny of a State's sexually discriminatory employment policy than does Title VII." 433 U.S. at 334 n. 20. That issue, explicitly avoided in *Dothard*, is central to the instant case.

The lower court's conclusion that any incongruity between Title VII and the Fifth Amendment would render the statute unconstitutional, *see* App. A, p. 34, begs the question. Congress may statutorily provide a remedy for the violation of certain rights which are not coterminous with rights guaranteed by the Constitution. The constitutional defect anticipated by the court of appeals would arise not because Congress provided a remedy for the violation of those rights, but because the statute was interpreted as precluding one from enforcing the full extent of his constitutional rights. Given the recognized differences between Title VII and the Fifth Amendment, Title VII should not merely be presumed to foreclose a constitutional cause of action, absent careful consideration and analysis. Since Title VII does not afford federal employees the full protection against governmental classifications which is guaranteed by the Constitution, it is essential that federal employees retain their remedy under the Fifth Amendment in order to adequately enforce their constitutional rights.[29]

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193 (1979), that fact does not contradict petitioners' position that one's constitutional right to be free from discrimination is substantively greater than the right protected by Title VII.

[29] To the extent that such an enforcement scheme, contemplating relief under both the Constitution and Title VII is deemed

[footnote continued]

CONCLUSION

For these reasons, petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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undesirable from a policy perspective, it is Congress and not the courts which is empowered to address the problem. Such a scheme, envisioning alternate remedies, is no different, however, from the remedial scheme available to private employees. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-48; Johnson v. Ry. Express Agency, 421 U.S. 545, 549 (1975).

APPENDIX A

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1477

ADOLPH KIZAS, ET AL.

v.

WILLIAM H. WEBSTER, ET AL., APPELLANTS

No. 82-1511

ADOLPH KIZAS, ET AL., APPELLANTS

v.

WILLIAM H. WEBSTER, ET AL.

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 78-00983)

Argued January 14, 1983

Decided April 26, 1983

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Philip L. Chabot, Jr. and *Mark S. Laufman*, for appellants in 82-1511 and cross-appellees in 82-1477.

Marleigh D. Dover, Attorney, Department of Justice, with whom *Stanley S. Harris*, United States Attorney, and *Anthony J. Steinmeyer*, Attorney, Department of Justice, were on the brief, for appellees in 82-1511 and cross-appellants in 82-1477.

Before: WALD and GINSBURG, *Circuit Judges*, and BAZELON, *Senior Circuit Judge*.

Opinion for the Court in parts I and II filed by *Senior Circuit Judge* BAZELON.

Opinion for the Court in part III filed by *Circuit Judge* GINSBURG.

BAZELON, *Senior Circuit Judge*: For many years, the Federal Bureau of Investigation ("FBI" or "Bureau") accorded a "special preference" to its clerical and support employees when making appointments to the position of Special Agent ("SA"). The Bureau substantially modified this preference in 1977 by adopting more stringent SA selection criteria and by implementing an affirmative SA hiring program for women and minorities. Adolph Kizas *et al.*, representing a class of present and former FBI employees, challenge these changes. Named as defendants are FBI Director William H. Webster, former Director Clarence J. Kelley, and the United States of America.

In Number 82-1477, Webster *et al.* appeal a judgment of the district court holding that the modification of the special preference constituted a "taking" of the employees' "property" in violation of the fifth amendment and the Tucker Act.[1] In Number 82-1511, the

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[1] *See* Kizas v. Webster, 492 F. Supp. 1135, 1144-50 (D. D.C. Feb. 15, 1980) (finding liability under fifth amendment) [hereinafter cited without cross-reference as "Opinion I"]; Kizas v. Webster, 492 F. Supp. 1151, 1153-56 (D. D.C. Apr. 25, 1980) (on motions to amend judgment and

employees cross-appeal an accompanying judgment dismissing their claim that the affirmative hiring program violates the fifth amendment and Title VII.[2]

For the reasons set forth below, we (1) reverse the district court's determination that the employees possessed vested property rights in the former special preference, compensable under the fifth amendment's takings clause or the Tucker Act; and (2) affirm the district court's dismissal of the employees' equal protection and Title VII challenges to the Bureau's affirmative hiring program.

I. Background

A. The Controversy

The FBI recruits Special Agents[3] through a variety of "programs" based on professional skills.[4] Candidates are eligible for consideration in the "Modified Program" if

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amend complaint) (adding Tucker Act jurisdiction) [hereinafter cited without cross-reference as "Opinion II"]. *See also* Kizas v. Webster, 532 F. Supp. 1331 (D.D.C. Feb. 18, 1982) (damage award) [hereinafter cited without cross-reference as Opinion III"].

[2] *See* Opinion I, 492 F. Supp. at 1151; Opinion II, 492 F. Supp. at 1152-53. The employees also challenge the methodology of the district court's damage award, *see* Opinion III, and the court's ruling that Webster and Kelley are immune from individual liability, *see* Opinion I, 492 F. Supp. at 1150-51.

[3] Special Agents "conduct criminal, security, and civil investigations covering a variety of classifications of cases over which the FBI has investigative jurisdiction." Federal Bureau of Investigation, Upward Mobility Plan, app. at iii (undated) [hereinafter cited without cross-reference as "Plan"], *reprinted in* II Joint Appendix ("JA") at 355.

[4] In addition to the "Modified Program," these programs include "Accounting," "Law," "Science," and "Language." In 1977 the Bureau added two additional selection programs—"Female" and "Minority." *See infra* notes 19-20 and accompanying text.

they are at least twenty-three years old, have a college degree, and have at least three years of "professional, executive, complex investigative or other specialized experience." [5] Candidates meeting these threshold requirements undergo a battery of qualifying examinations, and are then competitively rank-listed. Once the Bureau determines the number of Modified Program slots in a given SA training class,[6] candidates from the list are considered for appointment in rank-order.[7]

Until 1977, a "special preference" governed the participation of FBI employees in the Modified Program. This preference, developed as part of the Bureau's Upward Mobility Plan,[8] permitted clerical and support per-

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[5] Opinion I, 492 F. Supp. at 1139.

[6] In determining this number, the Bureau considers its need for the special skills offered by applicants from the several qualifying programs. Brief for Appellees at 4. The law and accounting programs typically have received the highest priority. *See* Memorandum from R.G. Hunsinger to Mr. Walsh, at 4 (Mar. 10, 1975), *reprinted in* II JA at 363.

[7] A favorable ranking does not guarantee appointment to a training class; candidates must successfully complete further "processing" requirements, including a physical examination, a background investigation, and a round of interviews. The mechanics of these procedures are outlined in Memorandum from Clarence M. Kelley to All Special Agents in Charge (July 20, 1977), *reprinted in* II JA at 407-14.

[8] "Upward mobility is defined as a systematic management effort that focuses Federal personnel policy and practice on the development and implementation of specific career opportunities for employees who are in positions which do not enable them to realize their full work potential." Plan at 1, *reprinted in* II JA at 346. Pursuant to Civil Service Commission and Department of Justice instructions, the Bureau is required to identify "target positions" to which employees may advance under the Plan. In addition to the Special Agent position, Bureau employees may aspire to "Fingerprint Identification," "Fingerprint Correspondence." "Supervisory Support and Service," "Typing and Stenographic," "Special Clerk," or "Paraprofessional Accounting Technician." *Id.* app. at i-iii, *reprinted in* II JA at 353-55.

sonnel to count their time with the Bureau toward satisfaction of the professional experience requirement; outside clerical work, on the other hand, was not considered "professional" experience. Moreover, Bureau employees' qualifying examinations were evaluated on a pass/fail basis; the examinations of other SA candidates were graded on a competitive scale. Finally, Bureau employees who passed the examinations were considered for appointment on a chronological basis, according to their date of qualification; other SA candidates were considered in competitive rank-order.

These features of the special preference were an attractive incident of employment with the FBI.[9] The parties agree that many college graduates joined the Bureau as clerical and support personnel in order to take

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[9] The district court summarized the attractions of the special preference as follows:

> [F]irst, it assured employees who had met the minimum qualifications that they would be considered for appointment on the basis of seniority; second, when Special Agent classes had to be filled on short-notice, the existence of a listing of qualified applicants gave clerical employees a substantial practical advantage over non-Bureau applicants, whose availability and qualifications could not be so easily and quickly ascertained; third, the procedure afforded the clerical employees an opportunity to meet all qualifications before vacancies were available, thus reducing a prospective applicant's uncertainty about whether he met SA qualifications and providing an early opportunity to cure deficiencies; fourth, the Modified Program permitted Bureau employees to qualify for appointment on the basis of work experience that would not meet the minimum requirements for entrance under the Modified Program if obtained outside the Bureau; and, fifth, the selection procedure guaranteed to a clerical employee that once qualified for appointment, he could not lose his position on the appointment list to a subsequent applicant, even if that applicant was subjectively better qualified.

Opinion I, 492 F. Supp. at 1141 (footnotes omitted).

advantage of the preference. The parties part company, however, in their perceptions of the Bureau's encouragement of this practice. The employees contend that the Bureau offered the preference "as a recruitment device in order to entice the highly-qualified, college-trained plaintiffs to accept positions at the clerical level," and that they "would not have accepted work at the FBI if the promises for advancement had not been made." [10] The Bureau vigorously responds that it "neither gave any assurances that the then current requirements of the Modified Program would remain in effect, nor gave any guarantees that applicants would become Special Agents when qualified." [11] The employees counter, and the district court agreed on summary judgment, that these disclaimers merely went to the likelihood of appointment *once an employee had qualified for the special preference*, and did not sufficiently indicate that the preference *itself* might be modified.[12]

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[10] Complaint ¶¶ 8, 19, Kizas v. Webster, Civ. No. 78-983 (D.D.C.) (filed May 31, 1978) [hereinafter cited without cross-reference as "Complaint"], *reprinted in* I JA at 27, 30.

[11] Brief for Appellees at 4-5 (citations omitted). In support of these assertions, the Bureau cites to various disclaimers in recruiting brochures, clerical application forms, personnel circulars, and internal memoranda. *See, e.g., id.* at 4-6; Reply Brief for Appellees at 3-4; documents reprinted in II JA at 360-64, 365-67, 396-97.

[12] The court concluded that,

> [t]o be effective in defeating expectations of clerical employees, the [disclaimers] would have to have been clearly addressed to the preference at issue . . . . The notices by defendants after 1972 that clerical employees could not be "guaranteed" advancement to Special Agent are too vague, too broad, and too imprecise to limit the preference here at issue, . . . particularly in view of the importance, duration, and widespread knowledge of the policy. Indeed, plaintiffs have never claimed a "guarantee" of advancement, only a preference for consideration.

Opinion I, 492 F. Supp. at 1148 (citation omitted).

An FBI "Ad Hoc Task Force" unanimously concluded in 1976 that the special preference system should be overhauled.[13] Specifically, the group found that the system (1) was not ensuring the appointment of the best qualified Modified Program candidates to the Special Agent position, and (2) had caused morale problems among the Bureau's career personnel to reach a "critical state" by "erod[ing] the true meaning of career development and upward mobility for our experienced career-minded employee." [14]

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[13] *See* Special Agent Pre-Employment Selection System, Task Force Findings (March 1977) [hereinafter cited without cross-reference as "Task Force Findings"], *reprinted in part in* II JA at 384-401. The Task Force was comprised of 16 Special Agents and support personnel, and was assisted by an outside management consulting firm. Its mission was not limited to revising the Upward Mobility Plan, but covered recruitment and testing of SA applicants under all of the Bureau's qualifying programs.

[14] Memorandum from W.K. DeBruler to the Director, at 34-35 (Dec. 16, 1976), *reprinted in* II JA at 382-83. The employee morale problems arose because

> [f]requently, the college educated employee who begins his Bureau career in a low level support position does so with the clear intent of becoming eligible for and receiving promotion to the Special Agent position in three years. During this waiting period, particularly at FBIHQ, these employees receive very little experience and/or expertise in FBI work responsibilities and very often develop a "shelf-time" attitude. . . .
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> Many high school graduates work their way through the support ranks, while sacrificing to obtain a college degree. A great many of these employees become extremely skilled and experienced in many areas of the Bureau's work during this time while obtaining a college degree to become eligible for the Special Agent position. This is understandable since the majority have as much as seven to ten years of Bureau service by this time. Under current policy, these veteran employees are then placed on the eligibility list for Special Agent considera-

Acting on the Task Force recommendations, Director Kelley ordered implementation of a "New Special Agent Selection System" ("NSASS") in April 1977.[15] The NSASS has "radically" changed the Bureau's Upward Mobility Plan.[16] Although clerical and support employees can still count their time with the Bureau toward satisfaction of the professional experience requirement, pass/fail examinations and the chronological ranking system have been eliminated. Under the NSASS, Bureau employees seeking an SA appointment pursuant to the Modified Program are competitively ranked with all other Modified Program applicants on the basis of test and interview scores.

Clerical and support personnel who had qualified for chronological consideration under the old system registered several complaints with the Bureau, requesting that their preferential status be "grandfathered."[17] The Bureau rejected these suggestions on the grounds that (1) the employee morale problems engendered by the old system demanded immediate rectification, and (2) the goal

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tion behind the on-board college graduate who has three years' service.

Id.; *see also* Task Force Findings at 20-22, *reprinted in* II JA at 395-97.

[15] Memorandum from Clarence M. Kelley to All Employees (Apr. 19, 1977), *reprinted in* II JA at 402-03.

[16] Affidavit of Clarence M. Kelley ¶ 5 (July 27, 1979) [hereinafter cited without cross-reference as "Kelley Affidavit"], *reprinted in* I JA at 97.

[17] *See, e.g.*, Memorandum from S.R. Burns to Mr. Long (May 23, 1977) (summarizing employee requests for addition of "grandfather clause" to the NSASS), *reprinted in* II JA at 404-06; Letter from Philip L. Chabot, Jr. to William H. Webster (Apr. 18, 1978) (threatening litigation), *reprinted in* II JA at 425-26; Memorandum from W.O. Cregar to R.E. Long (Oct. 24, 1978) (NSASS "will . . . work a severe hardship" on clerical and support employees; "a hard pill for them to swallow"), *reprinted in* II JA at 450-51.

of selecting "only the best qualified individuals . . . for further consideration" should proceed without delay.[18]

When the Bureau first implemented the NSASS in 1977, just over one percent of Special Agents were women, and fewer than five percent were minorities. Concluding that "certain investigative functions could be performed more effectively by particular minorities or by women," and that the SA force should on principle be "as representative of the community as possible," the Bureau modified the NSASS by adding two affirmative hiring programs—"Female" and "Minority"—to the existing SA selection programs.[19] The Bureau set the test score

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[18] Memorandum from Clarence M. Kelley to SAC, Sacramento (Aug. 17, 1977), *reprinted in* II JA at 415-16. Under the NSASS, SA applicants in all qualifying programs were required to be "reprocessed" pursuant to the new procedures, regardless of whether they had already qualified under the old system. Director Kelley stated that "[t]o revert to a previous selection procedure for a single applicant or group of applicants would negate the objective of the new system . . . ." Memorandum from Clarence M. Kelley to All Special Agents in Charge, at 7 (July 20, 1977), *reprinted in* II JA at 413; *see also* Letter from William H. Webster to Philip L. Chabot, Jr. (May 9, 1978), *reprinted in* II JA at 427.

In response to employee discontent, however, the Bureau did make one important adjustment to the NSASS: Prior to April 4, 1978, the Bureau permitted only *current* employees to qualify for the special preference. After that date, clerical and support personnel who had satisfied the three-year service requirement could qualify for consideration even if they subsequently left the Bureau's employ. *See* Brief for Appellees at 8.

[19] Brief for Appellees at 7. The genesis of the affirmative hiring program is ambiguous. *Compare* Kelley Affidavit ¶ 6 ("[T]he NSASS as I approved it and, to my knowledge, during my tenure as FBI Director did not contain provisions for affirmative hiring."), *reprinted in* I JA at 97, *with* Affidavit of William H. Webster ¶ 6 (Aug. 13, 1979) ("Shortly after I assumed my responsibilities as Director, members of my personal staff determined that the NSASS as originally ap-

cut-offs for applicants in the new programs at a lower level than those for applicants in the other programs.[20]

B. The District Court Proceedings

On May 31, 1978, a group of clerical and support employees filed a class action in district court against Director Webster and former Director Kelley in their individual and official capacities.[21] Invoking general federal question jurisdiction,[22] the employees argued that their "expectation of special consideration was a property interest that arose out of their employment contract[s]" with the Bureau.[23] Webster and Kelley, they argued, had "unilaterally revoked" this property interest "without compensation or procedure" as required by the fifth

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proved . . . had been modified after its implementation . . . and prior to my appointment as Director. . . . I approved of this modification at the time it came to my attention and continue to approve of it.") [hereinafter cited without cross-reference as "Webster Affidavit"], *reprinted in* I JA at 100.

[20] *See* Opinion I, 492 F. Supp. at 1143-44; see also documents reprinted in II JA at 428-49, 452-65.

[21] The employees sought to represent a class defined as

> those members of the FBI clerical and support staff who were employed prior to April 19, 1977 and who (a) were interested in positions as Special Agents, and (b) understood, as a condition of their employment, that once they satisfied minimum requirements for the Special Agent positions they would be given preferential consideration for future Special Agent positions.

Complaint ¶ 4, *reprinted in* I JA at 25. The district court certified the class under Fed. R. Civ. P. 23(b)(1)(A). Kizas v. Webster, Civ. No. 78-983 (D.D.C. May 15, 1979) (memorandum and order certifying class) [hereinafter cited without cross-reference as "Class Certification"], *reprinted in* I JA at 72-80.

[22] 28 U.S.C. § 1331 (1976 & Supp. V 1981).

[23] Complaint ¶ 21, *reprinted in* I JA at 30.

amendment.[24] The employees sought relief in the form of (1) money damages for lost income and advancement and for violation of their constitutional rights, (2) an injunction preventing Webster "from continuing his unlawful acts," and (3) a writ of mandamus directing Webster to fulfill his "contractual obligation." [25]

The employees subsequently filed an amended complaint, which repeated in its first count ("the takings count") the allegations of the original complaint, and alleged in its second count ("the discrimination count") that the Bureau's affirmative hiring program for women and minorities violated Title VII [26] and the equal protection component of the fifth amendment's due process clause.[27] The amended complaint sought the identical relief requested in the original complaint.

In a pre-judgment order, the district court held that the employees could pursue a *Bivens*-type action for damages,[28] implied directly from the fifth amendment's takings clause,[29] against Webster and Kelley.[30] On cross-

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[24] *Id.* ¶ 22, *reprinted in* I JA at 30.

[25] *Id.* at 10-11, *reprinted in* I JA at 31-32.

[26] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980).

[27] Amended Complaint, Kizas v. Webster, Civ. No. 78-983 (D.D.C.) (filed Jan. 15, 1979) [hereinafter cited without cross-reference as "Amended Complaint"], *reprinted in* I JA at 54-68. The district court granted the employees' motion to amend their complaint on February 16, 1979. *See* District Court Civil Docket Sheet, *reprinted in* I JA at 1, 12.

[28] *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[29] U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

[30] Kizas v. Webster, Civ. No. 78-983 (D.D.C. July 5, 1979) (order) [hereinafter cited without cross-reference as "Pre-Judgment Order"], *reprinted in* I JA at 94. The court's sole

motions for summary judgment, the court then held that the employees possessed "vested contractual rights" in the special preference accorded them under the former upward mobility system.[31] Because the preference was "a significant element of compensation," the court reasoned, "[t]he Bureau could no more take [it] away . . . without liability than it could refuse to pay an agreed amount of salary to one of its employees."[32] The court also concluded, however, that although *Bivens* damages for this "taking" could be awarded against Kelley and Webster in their official capacities, a qualified good-faith immunity shielded them from individual liability.[33]

Turning to the employees' request for injunctive and mandamus relief, the court held that an order requiring "specific performance" of the former preference would be both improper[34] and, in light of the availability of

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analysis in support of this decision was a citation to Davis v. Passman, 442 U.S. 228 (1979), which extended *Bivens* to the equal protection component of the fifth amendment's due process clause. *See infra* note 42.

[31] Opinion I, 492 F. Supp. at 1144-49.

[32] *Id.* at 1147. The court emphasized that its decision "does not imply that every aspect of FBI employment gives rise to vested contractual rights and that defendants are never free to alter the terms of employment without compensation." *Id.* (citation omitted). The distinguishing features of the preference, the court reasoned, were that it "was significant both to the Bureau and to the affected employees; it was well-understood and regularly used, and stood apart in character and significance from other aspects or incidents of FBI employment. It was not a mere condition of employment." *Id.*

[33] *Id.* at 1150. The court reasoned that the case presented "difficult questions of constitutional law," and noted the absence of any evidence that Kelley or Webster had acted with malicious intent. *Id.* at 1151.

[34] The court stated that the defendants "should not be prevented from bringing about substantial changes that they find necessary and appropriate." *Id.* at 1149-50 (footnote omitted).

monetary relief, unnecessary. The court then dismissed the discrimination count, reasoning that a decision in the employees' favor would "probably" give them merely the same relief as that flowing from its judgment on the takings count.[36]

Three months after judgment was entered, the district court substantially altered the jurisdictional foundations of its decision. Noting that the employees' action had become "one essentially for money damages against the United States," the court concluded that the Tucker Act[38] was the "sole independent basis for jurisdiction" over the takings count.[37] Accordingly, it granted the employees' motion to amend their complaint to add Tucker Act jurisdiction and to add the United States as a party defendant.[38] Because Tucker Act jurisdiction over claims exceeding $10,000 rested exclusively in the Court of Claims,[39] the district court also directed the employees either to transfer all their claims to the Court of Claims or to bifurcate their class, with the district court retain-

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[36] *Id.* at 1151.

[38] 28 U.S.C. §§ 1346(a)(2), 1491 (1976 & Supp. V 1981). Section 1491 provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Section 1346(a)(2) gives the district courts concurrent jurisdiction over Tucker Act claims that do not exceed $10,000.

[37] Opinion II, 492 F. Supp. at 1153.

[38] The government did not object. *See id.* at 1156.

[39] *See supra* note 36. The functions of the Court of Claims have been transferred to the United States Court of Appeals for the Federal Circuit. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

ing jurisdiction only over individual claims that did not exceed $10,000.

At the same time, the court declined to reconsider its dismissal of the discrimination count, though for different reasons than those relied upon in its initial decision. With respect to the employees' equal protection claim, the court held that Title VII constitutes the exclusive remedy for claims of employment discrimination by federal personnel subject to its protection. The court then dismissed the Title VII claim, holding that the employees had failed to observe the Act's administrative charge-filing requirement.

The employees elected to bifurcate their class. As a result, the district court transferred all takings claims over $10,000 to the Court of Claims.[40] Summary judgment on the remaining claims was awarded on February 18, 1982.[41] This appeal and cross-appeal followed.

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[40] The court transferred the claims of 612 employees. *See* Complaint, Alford v. United States, No. 249-81C (Ct. Cl.) (filed Apr. 17, 1981). That action is being held in abeyance pending resolution of the instant appeal.

[41] The district court awarded a total of $490,603 to 70 class members. Its theory of damages was that the employees should be placed in the financial position they would have been in had they not accepted clerical and support positions with the Bureau. Accordingly, the court awarded "reliance expenditures"—moving expenses incurred in order to accept FBI employment—and "reliance losses"—defined as the difference between (1) the employees' actual salaries from the time they joined the Bureau until either (a) the time they left or (b) April 4, 1978, whichever was earlier; and (2) the average amounts that persons of their age, sex, race and educational levels earned. Opinion III, 532 F. Supp. at 1333-34. The court denied compensation for the alleged 20-year diminution in the employees' earning capacities resulting from their service with the Bureau; moving expenses of employees who left the Bureau after the special preference was modified; college expenses allegedly incurred in reliance on the Modified Program; and alleged reduced wages of spouses. *Id.* at 1334-35.

II. THE TAKINGS COUNT

Whether their claim is grounded on the Tucker Act or implied directly from the fifth amendment's takings clause,[42] the employees are entitled to relief only if they have a vested right to the former special preference. They have advanced two theories in support of such a right. First, they argue that the preference is an element of deferred compensation "due and owing" them. Second, they invoke procedural due process cases to argue that their "legitimate expectations" in receiving the preference transformed the preference into an indefeasible property right.

The employees' first theory contradicts settled doctrines of federal employment and sovereign immunity. Their second theory, analogizing "property interests" protected by the due process clause to "property" protected by the takings clause, is fundamentally misconceived. Notwithstanding the equitable force of their claims, we therefore conclude that, as a matter of law, the employees had no vested rights in the former special preference.[43]

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[42] Our disposition does not require that we decide whether the district court properly implied a *Bivens*-type action for damages directly from the fifth amendment's takings clause. *See supra* note 30 and accompanying text. Resolution of this question would involve an analysis whether (a) the Tucker Act is an equally effective remedy, and (b) Congress intended the Tucker Act to supplant other remedies. *See* Carlson v. Green, 446 U.S. 14, 18-23 (1980) (also noting necessity for inquiry into "special factors counselling hesitation in the absence of affirmative action by Congress") (citation omitted). *See also* Bush v. Lucas, 647 F.2d 573, 576-77 (5th Cir. 1981) (federal employment relationship "is a special consideration which counsels hesitation in inferring a *Bivens* remedy"), *cert. granted*, 102 S.Ct. 3481 (1982) (No. 81-469). The district court did not undertake such an analysis. We are unaware of any other case extending *Bivens* to the takings clause.

[43] Thus we need not reach the other issues presented by the district court's judgment on the takings count. In addition

A. The Preference as an Element of Compensation

Although the employees filed four complaints over the course of the district court litigation, their theory of entitlement remained constant: that the special preference was a vested form of deferred compensation guaranteed by their "employment contract[s]" with the Bureau.[44] They argued that the Bureau offered this preference "as consideration for their acceptance of employment" and that, in turn, they gave consideration through years of support and clerical labor and through foregone alternative employment.[45] The district court agreed that the employees possessed "vested contractual rights" in the preference, reasoning that "[t]he history of representation, reliance, and mutual exchange of benefits contains all the elements of a classic contract implied in fact or of promissory estoppel."[46] In the court's view, "[t]he fact that the employer in this case is the government . . . does not alter either the result or the analysis."[47]

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to the propriety of a *Bivens*-type remedy, *see supra* note 42, these include (1) whether summary judgment on the contested facts of the case was proper; (2) whether, assuming the employees possessed vested property rights in the special preference, the Bureau's modification of the preference resulted in a constitutionally cognizable taking, *see* Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); (3) whether Kelley and Webster were individually immune from *Bivens* liability; and (4) whether the district court properly calculated the employees' damages.

[44] Complaint ¶ 21, *reprinted in* I JA at 30.

[45] *Id.* ¶¶ 19-21, *reprinted in* I JA at 30.

[46] Opinion I, 492 F. Supp. at 1145, 1147 (footnotes omitted).

[47] *Id.* at 1145. In support of this conclusion, the court reasoned that,

> [t]o secure fifth amendment protection, an interest need not have any special "constitutional" character; rather, constitutional protection is accorded interests that are derived independently from such sources as state law or contract. A contract right, such as the one at issue here, is plainly property for purposes of the fifth amendment,

We respectfully conclude that the district court's decision is irreconcilable with well-established doctrines of federal employment. With limited exceptions not relevant to the instant case, federal workers serve by appointment, and their rights are therefore a matter of "legal status even where compacts are made." [48] In other words, their entitlement to pay and other benefits "must be determined by reference to the statutes and regulations governing [compensation], rather than to ordinary contract principles." [49] "Though a distinction between appointment and contract may sound dissonant in a regime accustomed to the principle that the employment relationship has its ultimate basis in contract, the distinction nevertheless prevails in government service." [50]

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which the government cannot destroy without due process or just compensation.

Id. (citations and footnotes omitted).

[48] Kania v. United States, 650 F.2d 264, 268 (Ct. Cl.) (citation omitted), *cert. denied*, 454 U.S. 895 (1981).

[49] United States v. Larionoff, 431 U.S. 864, 869 (1977) (footnote omitted). *See also* Army & Air Force Exch. Serv. v. Sheehan, 102 S.Ct. 2118, 2124-26 (1982) (federal employment regulations do not create implied-in-fact contracts); Bell v. United States, 366 U.S. 393, 401 (1961) ("common-law rules governing private contracts have no place" in federal employment); Bigler v. United States, No. 234-81C, slip op. at 3 (Ct. Cl. May 18, 1982); Shaw v. United States, 640 F.2d 1254, 1260 (Ct. Cl. 1981) ("Federal officials who by act or word generate expectations in the persons they employ, and then disappoint them, do not *ipso facto* create a contract liability running from the Federal Government to the employee, as they might if the employer were not the government."); Urbina v. United States, 428 F.2d 1280, 1284 (Ct. Cl. 1970).

[50] Riplinger v. United States, 695 F.2d 1163, 1164 (9th Cir. 1983). *See also* United States v. Testan, 424 U.S. 392, 400 (1976) (courts may not "tamper" with doctrines of federal employment out of desire to be "responsive to a particular conception of enlightened governmental policy"); Shaw v.

Applying these doctrines, courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel. These cases have involved, *inter alia*, promises of appointment to a particular grade or step level,[81] promises of promotion upon satisfaction of certain conditions,[82] promises of extra compensation in exchange for extra services,[83] and promises of other employment benefits.[84]

United States, *supra* note 49, 640 F.2d at 1260 (government employees' claims that are founded on contract principles are "moral, not legal").

[81] *See, e.g.*, Riplinger v. United States, *supra* note 50, 695 F.2d at 1164; National Treasury Employees Union v. Reagan, 663 F.2d 239, 249-50 (D.C. Cir. 1981) (government not estopped from applying hiring freeze to individuals who had received written confirmation of their appointment to government service); Ganse v. United States, 376 F.2d 900, 902 (Ct. Cl. 1967); Price v. United States, 80 F. Supp. 542, 542-43 (Ct. Cl. 1948).

[82] *See, e.g.*, Qualls v. United States, 678 F.2d 190, 193-97 (Ct. Cl. 1982); Applegate v. United States, 211 Ct. Cl. 380, 380-82 (1975) (federal promotion freeze, negating oral and written assurances of promotion, did not constitute breach of contract); Peters v. United States, 534 F.2d 232, 234-35 (Ct. Cl. 1975).

[83] *See, e.g.*, Johnston v. United States, 175 F.2d 612, 617-19 (4th Cir. 1949); *cf.* Bielec v. United States, 456 F.2d 690, 696 (Ct. Cl. 1972).

[84] Army & Air Force Exch. Serv. v. Sheehan, *supra* note 49, 102 S.Ct. at 2124-26 (regulations governing separation procedures do not create implied-in-fact contract); Chu v. Schweiker, 690 F.2d 330, 332-34 (2d Cir. 1982) (promises to Public Health Service doctors that their residency programs would not be terminated); Shaw v. United States, *supra* note 49, 640 F.2d at 1260 (promises not to redesignate employee's position from career to noncareer status); Abbott v. United States, 200 Ct. Cl. 384, 388-90 (alleged contract regarding computation of retirement pay: "[N]o property has been taken from [plaintiffs] by the government. They are in

The employees argue, however, that this formidable body of precedent is inapposite, because previous cases "involve[d] merely an expectancy over which the government maintained discretion to grant or deny."[55] They seek to draw an "essential distinction between rights already earned and opportunities merely anticipated which distinguishes this case" from previous cases.[56] There are two difficulties with this argument. First, it mischaracterizes precedent: The cases cited above typically involved situations where individuals claimed, as the employees here do, either that they had given "consideration" or that they had detrimentally relied on government assurances.[57] Second, the purported distinction simply begs the question at issue: It fails to demonstrate that the preference *was* an element of compensation rather than an "opportunity merely anticipated."

That question can only be answered by reference to statute and regulation. Title 5 of the United States Code and its implementing regulations set forth in meticulous

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reality complaining about what they would have received if the system had not been changed."), *cert. denied*, 414 U.S. 1024 (1978).

[55] Reply Brief for Appellants at 9.

[56] *Id.* at 10.

[57] *See, e.g.*, Riplinger v. United States, *supra* note 50, 695 F.2d at 1164 (employee left private sector and began government service in reliance on promises of particular salary level); National Treasury Employees Union v. Reagan, *supra* note 51, 663 F.2d at 245-46 ("federal government played hide-and-seek with job-seekers, assuring them that jobs awaited them and only later—on occasion, after the prospective employee had acted on the assurance of a job—reversing itself"); Shaw v. United States, *supra* note 49, 640 F.2d at 1255 (employee "burned his bridges" in reliance on government promises); Applegate v. United States, *supra* note 52, 211 Ct. Cl. at 380-81; Abbott v. United States, *supra* note 54, 200 Ct. Cl. at 390; Ganse v. United States, *supra* note 51, 376 F.2d at 902.

detail the compensation that attaches to positions in the government service.[58] These provisions govern all incidents of employee compensation, including basic salaries; salary increases; overtime, holiday, and sick pay; life and health insurance benefits; retirement benefits; travel and subsistence allowances; and compensation for injury and unemployment.[59] These provisions are the *exclusive* source of employees' compensation rights.[60] Employees may receive additional perquisites—such as career development programs, educational opportunities, attractive office surroundings, and so forth—but they have *no* indefeasible rights to such incidents.[61] By limiting com-

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[58] Congress has carved out exceptions, *see, e.g.*, 5 U.S.C. § 5102(c) (1976 & Supp. V 1981), but it is undisputed that the employees in the instant case were Government Schedule ("GS") personnel covered by the provisions of Title 5.

[59] *Id.* § 5301 *et seq.*

[60] *See id.* § 5107 (GS classifications of positions "are the basis for pay and personnel transactions"); *id.* § 5301 (compensation of GS workers "shall be fixed and adjusted in accordance with the principles" set forth in Title 5); *id.* § 5536 ("An employee or a member of a uniformed service whose pay or allowance is fixed by statute or regulation *may not receive additional pay or allowance* for the disbursement of public money or *for any other service or duty, unless specifically authorized by law and the appropriation therefor specifically states that it is for the additional pay or allowance.*") (emphasis added).

[61] These principles underlie two opinions holding that veterans' civil service preference rights do not create contractual or other property interests. In Monaco v. United States, 523 F.2d 935 (9th Cir. 1975), *cert. denied*, 424 U.S. 914 (1976), a group of retired military personnel challenged a 1964 statutory modification of the Veterans' Preference Act of 1944, as amended, 5 U.S.C. §§ 3313-3315, 7511-7512, 7701 (1976 & Supp. V 1981). They argued that, "by enlisting in the military service between 1944 and 1964," they had acquired "vested, unrepealable" contract rights to the preference in effect at the time of their military service. *Id.* at 939. The court rejected their claim, holding that the veterans' prefer-

pensation rights to those spelled out pursuant to Title 5, thereby barring "'any additional pay, extra allowance, or compensation, *in any form whatever*,'"[62] Congress intended that "'[e]xtras,' which are such a fruitful subject of disputes in private contracts, were to be eliminated from the public service."[63] Because the special preference at issue here was not defined as an element of compensation by any statute or regulation, the employees' argument that they had a vested right to its retention must fail.[64]

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ence is a mere "gratuity" rather than a "condition" of military service. *Id.* at 939-40. "[W]hatever anticipations a serviceman entertained between 1944 and 1964 with respect to preferential advantage in the federal civil service were no more than some sort of floating expectancy entirely dependent upon the government's bounty. A claim of unconstitutional deprivation cannot be built upon this foundation." *Id.* at 940. *See also* Mack v. United States, 635 F.2d 828, 832 (Ct. Cl. 1980) (provisions of Veterans' Preference Act "do not create an interest in property subject to being taken for public use"), *cert. denied*, 451 U.S. 913 (1981).

[62] Johnston v. United States, *supra* note 53, 175 F.2d at 617 (emphasis in original) (quoting statutory predecessor of 5 U.S.C. § 5536).

[63] Mullett's Adm'x v. United States, 150 U.S. 566, 570 (1893). *See also* United States v. Saunders, 120 U.S. 126, 129 (1887); Urbina v. United States, *supra* note 49, 428 F.2d at 1285; Schaible v. United States, 135 Ct. Cl. 890, 898 (1956) (Title 5 eliminates "[a]ny suggestion of barter and trade in public employment").

[64] The employees appear to argue, however, that the Director's broad delegated discretion over Bureau personnel management, *see* 28 C.F.R. § 0.137 (1982), supplants the compensation scheme set forth in Title 5. This argument easily fails. It is well-established that general grants of discretion do not override the extra-compensation prohibitions unless *explicitly* spelled out by statute. *See, e.g.*, Johnston v. United States, *supra* note 53, 175 F.2d at 615-17 (collecting cases). For examples of such explicit exceptions, see 5 U.S.C

Even if the special preference had been created by statute or regulation, however, money damages from the government for its rescission would be precluded for another reason: The Supreme Court has repeatedly rejected the proposition that "the violation of any statute or regulation relating to federal employment automatically creates a cause of action against the United States for money damages." [65] Jurisdiction to award such damages exists only where the statutes or regulations on which rights are premised can *also* "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." [66] Congress has delineated with precision the circumstances in which "unjustified or unwarranted personnel actions" may be remedied through

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§§ 5922, 5942, 5947 (1976 & Supp. V 1981); 22 U.S.C. §§ 287e-1, 2389, 2513 (1976 & Supp. V 1981); 39 U.S.C. § 1001 (1976). Rather, general grants of discretion with respect to "compensation" extend only to those details of pay administration that have been delegated by Congress. *See, e.g.*, 5 U.S.C. § 5545(c) (1976 & Supp. V 1981) (determining appropriate method for calculating overtime pay).

[65] United States v. Testan, *supra* note 50, 424 U.S. at 401. *See also* Army & Air Force Exch. Serv. v. Sheehan, *supra* note 49, 102 S.Ct. at 2124-25; United States v. Hopkins, 427 U.S. 123, 130 (1976).

[66] United States v. Testan, *supra* note 50, 424 U.S. at 400 (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). This rule derives from the familiar principle that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." United States v. King, 395 U.S. 1, 4 (1969). *See also* Army & Air Force Exch. Serv. v. Sheehan, *supra* note 49, 102 S.Ct. at 2124-25; Donovan v. United States, 580 F.2d 1203, 1206-08 (3d Cir. 1978) (failure to promote employee in accordance with applicable regulations not remediable through back-pay award); Mack v. United States, *supra* note 61, 635 F.2d at 832 (Army's alleged failure to accord plaintiff a disabled veteran's hiring preference not remediable through money damages).

money damages from the public fisc.[67] The employees in the instant case do not fall within the scope of any of these statutory provisions. These provisions "would be rendered superfluous" [68]—and Congress's intent therefore "would obviously be subverted" [69]—if we upheld the district court's judgment in the instant case.[70]

The employees invoke language in several Supreme Court opinions that, they claim, supports their "deferred compensation" analysis. The Court has noted, for example, that a government worker may recover for the denial "of pay due for services already performed, but still owing," [71] and for "the benefit of the position to which he was appointed." [72] The employees' argument that such language "precisely" characterizes their case [73] merely begs the question of what benefits were in fact "due and owing" them. As discussed above, that question

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[67] 5 U.S.C. § 5596 (1976 & Supp. V 1981) (Back Pay Act); *see also, e.g.*, 42 U.S.C. §§ 2000e-5, 2000e-16 (1976 & Supp. IV 1980) (Title VII back pay and other retroactive relief).

[68] United States v. Testan, *supra* note 50, 424 U.S. at 404.

[69] Army & Air Force Exch. Serv. v. Sheehan, *supra* note 49, 102 S.Ct. at 2125.

[70] This jurisdictional limitation does not, of course, extend to the employees' *Bivens*-type action against Kelley and Webster. Even assuming the propriety of such a remedy, *see supra* note 42, the employees' claim is defeated because no vested right subject to a taking existed in the first place. *See supra* notes 48-64, *infra* notes 71-88, and accompanying text.

[71] United States v. Larionoff, *supra* note 49, 431 U.S. at 879 (distinguishing the "serious constitutional questions [that] would be presented" by such a case from instances of mere prospective reductions in anticipated pay).

[72] United States v. Testan, *supra* note 50, 424 U.S. at 402. The district court also cited to this language in support of its holding. Opinion I, 492 F. Supp. at 1148-49.

[73] Reply Brief for Appellants at 10.

is answered exclusively by reference to the statutes and regulations governing compensation. The Court's language can in no way be read as equitably expanding the definition of "pay" that is "due" government personnel.[74]

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[74] Reliance on other language is similarly unavailing. In holding that jurisdiction to award money damages against the United States "cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages," for example, the Court has noted an exception for suits seeking the return of property "improperly exacted or retained." Army & Air Force Exch. Serv. v. Sheehan, *supra* note 49, 102 S.Ct. at 2125 & n.11 (quoting United States v. Testan, *supra* note 50, 424 U.S. at 401). It might be argued that the employees fall within this exception, on the theory that the Bureau "improperly exacted" their services through promises of preferential consideration. The "improperly exacted or retained" rule, however, is simply a recognition that the Tucker Act protects private property from illegal government levy, regardless of whether any other statute or regulation authorizes recovery. *See* Eastport S.S. Corp. v. United States, *supra* note 66, 372 F.2d at 1007-08. Where a claimant alleges that property rights have been *created* through the operation of statutes or regulations, on the other hand, damages may be recovered *only* if the relevant provisions so authorize. *See supra* notes 65-66 and accompanying text. Because the employees' compensation rights can only be defined by reference to statute and regulation, they do not fall within the scope of the "improperly exacted or retained" exception.

The employees attempted to bolster their claim at oral argument through citation to a series of habeas corpus cases permitting *rescission* of military enlistment commitments procured through official misrepresentations. *See, e.g.*, Pence v. Brown, 627 F.2d 872 (8th Cir. 1972); Helton v. United States, 532 F. Supp. 813 (S.D. Ga. 1982); Withum v. O'Connor, 506 F. Supp. 1374 (D.P.R. 1981). As those cases have themselves emphasized, however, they are "quite different from a suit against the government for misrepresentations in contracting in which the complaint seeks money damages or specific performance." Pence v. Brown, *supra*, 627 F.2d at 874.

B. The Analogy to Due Process "Property Interests"

On appeal, the employees belatedly concede the "verity" of the doctrine that federal personnel do not have contractual relationships with the government.[75] They argue, however, that the district court's "reference to certain contract principles" should now be read as "merely provid[ing] an analytical framework in which to consider the reasonableness of the expectations of the parties." [76] In other words, they would distinguish between rights vesting through contract and rights vesting through "legitimate expectations which, once created, are protected from divestiture without compensation." [77]

In support of this purported distinction, the employees invoke a familiar line of cases holding that, for purposes of procedural due process guarantees, a person has a "property interest' in a governmentally conferred benefit if he has a "legitimate claim of entitlement" to the benefit.[78] Where such a "property interest" exists, and an individual's entitlement turns upon material questions of disputed fact, the due process clause guarantees minimum procedural protections, typically notice and an evidentiary hearing, when the individual is deprived of the benefit.[79] In the realm of federal employment, protected "property interests" can arise not only through operation of statute and regulation, but also through

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[75] Response in Opposition to Motion to File Affidavits at 2 (filed Nov. 8, 1982).

[76] *Id.* at 1-2. *See also* Reply Brief for Appellants at 8 ("The district court did not premise liability upon a contract.").

[77] Response in Opposiiton to Motion to File Affidavits, *supra* note 75, at 2.

[78] Board of Regents v. Roth, 408 U.S. 564, 577 (1972); *see also* Perry v. Sindermann, 408 U.S. 593, 601 (1972).

[79] *See generally* G. GUNTHER, CONSTITUTIONAL LAW 646-61, 668-69 (10th ed. 1980).

"agency-fostered policies or understandings" [80] and the "implicit . . . overall workings of a particular government employer." [81]

The employees correctly note that the district court relied heavily on these due process cases in fashioning its conclusion that the special preference was a "vested contractual right." Neither the court nor the employees, however, examined the presupposition that underlies reliance on these cases: that a "legitimate claim of entitlement" rises to the level of "property" protected by the takings clause.

This presupposition is without foundation. As a leading commentator has admonished, "[t]he fifth amendment employs two independent clauses to address two independent issues. A claim of *deprivation* of property without due process of law cannot be blended as one and the same with the claim that property has been *taken* for public use without just compensation." [82] A "legitimate claim of entitlement" to a government benefit does not transform the benefit *itself* into a vested right. Rather, due process "property interests" in public benefits are "limited, as a general rule, by the governmental power to remove,

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[80] Colm v. Vance, 567 F.2d 1125, 1131 (D.C. Cir. 1977); *see also* Ashton v. Civiletti, 613 F.2d 923, 928-29 (D.C. Cir. 1979).

[81] Colm v. Vance, *supra* note 80, 567 F.2d at 1128 (citations omitted).

[82] J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 4.3, at 187 (rev. 3d ed. Cum. Supp. 1982) (footnote omitted) (emphasis in original). *But see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-2, at 459 n.11 (1978) ("The body of rules determining which expectations constitute compensable property interests and which do not . . . plainly requires reconsideration in light of the broader definition of property interests now employed in the law of procedural due process. There seems no good reason why the broader definition should not be extended to the takings context.") (citations omitted).

through prescribed procedures, the *underlying source of those benefits.*" [83]

Richardson v. Belcher [84] illustrates this distinction. In that case, the district court had held that recipients of social security disability benefits possessed "indefeasible" property rights that could not be divested by benefit-offset provisions enacted after they had begun to receive benefits.[85] The district court grounded its decision on *Goldberg v. Kelly*,[86] which held that entitlement to welfare benefits is in the nature of a "property interest" protected by procedural due process guarantees. The Supreme Court reversed, emphasizing the difference between entitlements and indefeasible rights: "[T]he analogy drawn in *Goldberg* between social welfare and 'property,' . . . cannot be stretched to impose a constitutional limitation on

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[83] O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 796, 798 (1980) (Blackmun, J., concurring in the judgment) (emphasis added) ("Public benefits are not held in fee simple."). *See also* Geneva Towers Tenants Org. v. Federated Mortgage Investors, 504 F.2d 483, 494 n.2 (9th Cir. 1974) (Hufstedler, J., dissenting) ("The interest in a benefit that gives rise to an entitlement cannot be an absolute right. If the beneficiary's right to receive the benefit were absolute, the Government without awarding him just compensation could not deprive him of the right even after prior notice and hearing."); Wilkinson, *Goss v. Lopez: The Supreme Court As School Superintendant*, 1975 SUP. CT. REV. 25, 58-59 (procedural due process doctrine "does not interfere with a state's substantive lawmaking capacity . . . . The whole concept of entitlement, in fact, only takes its cue from state or federal substantive law.").

[84] 404 U.S. 78 (1971).

[85] Belcher v. Richardson, 317 F. Supp. 1294, 1297-98 (S.D. W. Va. 1970).

[86] 397 U.S. 254 (1970). The district court viewed *Goldberg* as effectively overruling Flemming v. Nestor, 363 U.S. 603 (1960), which held that contributors to the social security fund have no indefeasible property rights to receive benefits.

the power of Congress to make substantive changes in the law of entitlement to public benefits." [87]

The district court's judgment in the instant case rested on the same sort of analogy to procedural due process principles that was rejected in *Belcher*. If a clerical employee had arbitrarily been denied placement on the chronological list, his "legitimate claim of entitlement" to the special preference might well have guaranteed him minimum procedural safeguards. But here the underlying entitlement was *itself* abolished. Broad due process "property" concepts are therefore inapposite to the question whether the preference was an element of deferred compensation, a question governed *exclusively* by the doctrines outlined above in Part II-A.[88]

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[87] 404 U.S. at 81 (citation omitted).

[88] The employees' complaints charged not only that the Bureau had deprived them of vested rights to the special preference, but that it had done so in a procedurally defective manner. *See, e.g.*, Complaint ¶ 23 (Bureau "did not provide any hearing or notice to plaintiffs" prior to adopting the NSASS; employees "had no opportunity to contest the termination of their privileged status"), *reprinted in* I JA at 31. This claim of a due process right to participate in Bureau modifications of the Upward Mobility Plan confuses disputes involving an individual's entitlement to a benefit with situations involving across-the-board revocation of the benefit *itself*. The distinction is critical. As Justice Blackmun cogently observed in *O'Bannon v. Town Court Nursing Center*:

> The Constitution would not have entitled John Kelly to a fair hearing if New York had chosen to disband its public assistance programs rather than to cut off his particular award. See *Goldberg v. Kelly*, 397 U.S. 254 (1970). Nor would Texas have had to afford process to Professor Sindermann had it decided for budgetary reasons to close Odessa Junior College. See *Perry v. Sindermann*, 408 U.S. 593 (1972). And we would be surprised to learn that Dwight Lopez had a constitutional right to procedures before the Ohio Department of Education suspended classes at Columbus High School for 10 days due to the discovery of faulty electrical wiring requiring that much

GINSBURG, *Circuit Judge*:

III. THE DISCRIMINATION COUNT

The second count (Count II) of the Kizas complaint[89] challenges the phase of the NSASS associated with the Bureau's affirmative hiring program.[90] Two new Special Agent selection tracks were established in this phase, one

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time for repair work. See *Goss v. Lopez*, 419 U.S. 565 (1975).

Supra note 83, 447 U.S. at 798 (Blackmun, J., concurring in the judgment).

Even assuming *arguendo* that the employees had due process "property interests" in retention of the special preference, the procedures available to them for challenging the NSASS were constitutionally sufficient. Theirs was manifestly not a case of "grievous loss" requiring prior notice and hearing. *Compare* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 12-22 (1978); Goldberg v. Kelly, *supra* note 86, 397 U.S. at 264. After the Bureau announced its implementation of the NSASS, the employees were given several administrative opportunities to challenge the new system, and the Bureau gave rational, legitimate reasons in rejecting their requests that the NSASS be applied only to prospective clerical and support personnel. *See supra* notes 17-18 and accompanying text. And the employees have had, of course, a full opportunity to federal court review of the Bureau's action. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 349 (1976). No further safeguards were constitutionally required.

[89] The original complaint, filed May 31, 1978, stated only the takings count, *see supra* text at notes 21-25; an order granting leave to file an amended complaint adding the discrimination count was filed February 16, 1979. *See supra* note 27.

We refer in this part of the opinion to the employees as "the Kizas complainants," and designate, as their complaint does, the takings claim as "Count I," the discrimination count as "Count II."

[90] This phase was introduced after the initial implementation of the NSASS. *See supra* note 19 and accompanying text.

for women, one for members of certain minority groups.[91] These tracks, the Kizas complainants contend, exacerbated removal of the marked preference formerly accorded the class of clerical employees to which they belong, a class largely composed of white males.[92] The new tracks, they allege, created sex- and race-based preferences in violation of Title VII of the Civil Rights Act of 1964 and the fifth amendment to the Constitution.

Ultimately, the district court dismissed the race and sex discrimination challenge, holding crisply that (1) Title VII "constitutes the exclusive remedy for claims of em-

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[91] The discrimination count alleged that "[t]here has never been a judicial finding that the FBI discriminates on the basis of race or sex." Amended Complaint ¶ 36, *reprinted in* I JA at 66. The Bureau's Special Agent employment profile, however, is not in doubt. As the district court found:

> Between 1960 and 1972 [the year Title VII was extended to cover federal employment], the number of black Special Agents was less than one percent of the total number of agents; between 1973 and mid-1979, the percentage of black Special Agents has risen from one percent to 2.55 percent. No female Special Agents were permitted before 1972; since then, the percentage of female Special Agents has risen to 2.18 percent.

Opinion I, 492 F.Supp. at 1144.

[92] At oral argument, counsel for the Kizas complainants stated that the class of clerical employees whose preference had been removed numbered several hundred and that the class included only a few women and a few members of minority groups. (No female clerical employee could have held a preference prior to 1972; until that year, the FBI excluded women from positions as Special Agents. *See supra* note 91.) The district court's class action certification, *see supra* note 21, framed to fit Count I, the takings count, also encompassed Count II, the employment discrimination count. The court recognized, however, that, for Count II purposes, redefinition of the class eventually might be required "to exclude that subclass of minorities and women who fare better under the present regime." Class Certification at 8, *reprinted in* I JA at 79.

ployment discrimination by federal employees subject to its protection," and that (2) the Kizas complainants could not pursue a Title VII action in court because they had neglected a precondition to suit—they had failed to file a discrimination charge at the administrative level. Opinion II, 492 F.Supp. at 1151.[93] The dismissal of Count II on the grounds stated correctly reflects the governing law and is therefore affirmed.

A. Exclusivity of Title VII for Covered Federal Employees

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. §§ 2000e-2, 2000e-3 (1976). Section 717 of Title VII, added by section 11 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 111 (codified at 42 U.S.C. § 2000e-16 (1976 & Supp. IV 1980)), extends the statute's protection to federal employees, including "employees . . . in executive agencies as defined in section 105 of Title 5."[94] As em-

[93] Prior to this definitive ruling on Count II, the district court had shifted its position on this aspect of the complaint. Initially, in an order dated July 5, 1979, the district court declared that race and sex discrimination "constitutional claims" were not precluded. Pre-Judgment Order at 1, *reprinted in* I JA at 94. On February 15, 1980, however, after holding in plaintiffs' favor on Count I, the district court declared that it was "not necessary" to address Count II because plaintiffs were likely to receive full relief through their recoveries under Count I. Opinion I, 492 F.Supp. at 1151. Plaintiffs then moved for reconsideration, urging that relief under the two counts would not be coextensive. The district court, at that point, arrived at its final view of the matter. On April 25, 1980, it denied the motion for reconsideration and directed dismissal of Count II for the two reasons set out in the text accompanying this note. Opinion II, 492 F.Supp. at 1152-53.

[94] 5 U.S.C. § 105 (1976) reads: "For the purpose of this title, 'Executive agency' means an Executive department, a Government corporation, and an independent establishment."

ployees of the FBI, an executive agency within section 105's compass, the Kizas complainants are clearly covered by Title VII.[96]

Despite coverage under Title VII, the Kizas complainants contend that they may pursue, additionally or alternately, a claim directly under the fifth amendment. This argument is unavoidably foreclosed by precedent. In *Brown v. GSA*, 425 U.S. 820 (1976), the Supreme Court derived from the legislative history and structure of the 1972 Act an unqualified holding: Title VII of the Civil Rights Act of 1964, as amended, "provides the exclusive judicial remedy for claims of discrimination in [covered] federal employment." *Id.* at 835.[96] The Title VII remedy declared exclusive for federal employees in *Brown v. GSA* precludes actions against federal officials for alleged constitutional violations as well as actions under other federal legislation. *See Gissen v. Tackman*, 537 F.2d 784 (3d Cir. 1976) (en banc).[97] We have fol-

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[96] On brief, counsel for the Kizas complainants suggested that, because FBI employment is not within the competitive service, it was doubtful whether Title VII covered Bureau employees. As note 94 and the accompanying text indicate, however, Title VII's coverage of executive agency employees is comprehensive, reaching excepted service as well as competitive service employees. At oral argument, counsel for Kizas conceded that the statute applies to Bureau employees.

[96] The Court contrasted private sector employment discrimination claims, citing its holding in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), that "in the context of *private employment* Title VII did not pre-empt other remedies." 425 U.S. at 833 (emphasis in original). *See also, e.g.*, Poolaw v. City of Anadarko, 660 F.2d 459 (10th Cir. 1981); Garner v. Giarruso, 571 F.2d 1330 (5th Cir. 1978) (state and municipal government employees may maintain employment discrimination claims under Civil Rights Act of 1866).

[97] *See also* Purtill v. Harris, 658 F.2d 134 (3d Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3489 (U.S. Nov. 23, 1981) (No. 81-1010) (relying on *Brown v. GSA* in holding that Age Discrimination in Employment Act preempts judicial remedies

lowed the Supreme Court's clear instruction, and have no warrant to depart from it in this case. *See Lawrence v. Staats*, 665 F.2d 1256, 1259 (D.C. Cir. 1981); *Torre v. Barry*, 661 F.2d 1371, 1374 (D.C. Cir. 1981); *Hofer v. Campbell*, 581 F.2d 975, 978 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); *Richardson v. Wiley*, 569 F.2d 140, 141 (D.C. Cir. 1977) (per curiam) (federal employee covered by Title VII may not sue under any other federal statute, *e.g.*, 42 U.S.C. § 1981 (1976), or under the fifth amendment). *See also Morris v. WMATA*, No. 81-1209, slip op. at 5 (D.C. Cir. March 8, 1983).

Davis v. Passman, 442 U.S. 228 (1979), relied upon by the Kizas complainants, leaves untouched the square ruling in *Brown v. GSA* that for the covered federal employee, Title VII is the "exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." 425 U.S. at 829. *Davis* involved employment in the office of a member of Congress in a position outside Title VII's domain. The Court held in *Davis* that section 717 does not foreclose the implication of a claim for damages directly under the fifth amendment when the complainant is "expressly unprotected by [Title VII]." 442 U.S. at 247. Citing *Brown v. GSA*, however, the Court noted that Title VII is exclusive when covered federal employees "seek to redress the violation of rights guaranteed by the statute." *Id.* at 247 n.26.

The Kizas complainants suggest, in repeated but less than lucid argument, that the Constitution's equal protection principle entails a stricter restraint on classification by race or sex than does Title VII and would shelter them against "reverse" discrimination that the statute may permit. *See* Post-Argument Memorandum at 6-10 (filed Jan. 21, 1983). We need not linger over this sug-

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based directly on the Constitution for claims of age discrimination in federal employment).

gestion. It suffices to point out that if the statute permitted discrimination *in government employment* that the Constitution prohibits, courts would be obliged to hold the statute invalid to the extent it conflicted with the superior norm. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Dothard v. Rawlinson*, 433 U.S. 321, 334 n.20 (1977) (with respect to government employment, Title VII "would have to be interpreted at the very least so as to conform to the [equal protection principle]").

In sum, the Kizas complainants are comprehensively protected by Title VII against federal employment discrimination. They may not circumvent the "careful and thorough remedial scheme" Congress ordered for them; their access to court is determined by that effective, albeit demanding, statute. *Brown v. GSA*, *supra*, 425 U.S. at 833. We consider next whether the Kizas complainants have met, or should be relieved of the obligation to meet, one of the statute's demands, the administrative charge-filing requirement Congress ordered as a precondition to the maintenance of the Title VII court action challenging employment discrimination by a federal agency.

B. Title VII's Initial Charge-Filing Requirement for Federal Employees

Relief under Title VII, in both private and public sector cases, is generally dependent upon the filing of a timely administrative charge. *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *Brown v. GSA*, *supra*, 425 U.S. at 832-33; *see Porter v. Adams*, 639 F.2d 273, 276 (5th Cir. 1981) ("sine qua non" for Title VII civil action regarding federal employment is a complaint formally filed with the agency charged with discrimination). The timely charge-filing requirement, however, is not a jurisdictional prerequisite to suit in district court; it operates "like a statute of limitations, [which] is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

Concededly, no named plaintiff in this action, indeed no member of the Count II class that named parties now purport to represent, complied with the charge-filing requirement either on time or belatedly. Nonetheless, the Kizas complainants urge that the district court erred in dismissing their Title VII claim for failure to pursue administrative relief. They argue, primarily, that formal resort to administrative redress would have been futile. To demonstrate the futility of an application for administrative review, and to excuse their total bypass of that route to relief, they cite a late discovery of their attorneys. The Kizas complainants assert that over a year after amending their complaint to include the Count II sex and race discrimination challenge, on April 7, 1980, their attorneys learned that in 1977 a similarly situated individual, Robert B. Manning, had filed an administrative complaint with the FBI's EEO Office alleging race and sex discrimination stemming from the Bureau's modification of the NSASS to incorporate an affirmative hiring program. Brief for Appellants at 24-25; *see* Reply Brief for Appellants at 21-23.[98]

We explain first why the required recourse to administrative review has special prominence with respect to the Title VII claims of federal employees, and why *Zipes v. Trans World Airlines, Inc.*, *supra*, does not support judicial authorization of the total waiver the Kizas complainants urge. We then turn to the argument that the administrative charge filed by Manning should suffice to cover the class certified by the district court.

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[98] Although the Kizas complainants assert that Manning's charge was filed in 1977, Brief for Appellants at 24, the documents submitted to the district court indicate that the charge was filed in October 1978, after unsuccessful informal exchanges between Manning and the Equal Employment Opportunity Counselor in the FBI's New Orleans office. *See* Attachments to Memorandum to Court Addressing New Evidence of Plaintiffs' Exhaustion of Administrative Remedies (filed Apr. 23, 1980), *reprinted in* I JA at 141, 153.

1. The primary role of federal agencies with respect to complaints of discrimination proscribed by Title VII

Title VII federal proceedings with respect to private sector employment generally originate when the complainant files a charge with the Equal Employment Opportunity Commission (EEOC), the federal authority broadly responsible for enforcement of the statute. *See* 42 U.S.C. § 2000e-5(b), (e) (1976); 29 C.F.R. §§ 1601.6-.14 (1982). The charging party in a private sector case need not first complain to the allegedly offending employer. By contrast, Congress directed federal employees or applicants for federal employment to complain initially to the agency alleged to have violated Title VII. Regulations prescribe in detail the administrative procedures available to the charging party,[99] and the statute hinges

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[99] The Equal Employment Opportunity (EEO) regulations currently in effect appear at 29 C.F.R. §§ 1613.201-.283 (1982). They recodify, without significant change, rules originally issued by the Civil Service Commission, codified at 5 C.F.R. §§ 713.201-.283 (1978). The recodification occurred in 1979 after enforcement and related functions vested in the Civil Service Commission under section 717 of Title VII were transferred to the EEOC pursuant to section 3 of President Carter's Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978), 92 Stat. 3781.

Summarized generally, the regulations require a federal employee to bring his or her complaint to the attention of one of the agency's EEO counselors ordinarily within 30 days of the alleged Title VII violation. If the matter is not resolved at this threshold, the complaint is formally filed with the agency. After the agency's investigation, if relief acceptable to the employee is not offered, the employee may request an evidentiary hearing before an examiner who is not employed by the agency. Final decision is entrusted to the head of the agency or an official designated by the agency head. The employee may appeal the agency's final decision to the EEOC or, in certain cases, the Merit Systems Protection Board, but a court action may be initiated without pursuing administrative relief beyond the agency level.

court review on prior resort to the agency whose employment practice is challenged. Section 717(c)[100] authorizes the commencement of a civil action once the agency has taken "final action" on the charging party's complaint or, if no "final action" is taken, after 180 days have elapsed from the filing of the "initial charge" with the agency.[101]

Congress did not casually impose the requirement that a person charging violation of Title VII by a federal

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[100] 42 U.S.C. § 2000e-16(c) (1976 & Supp. IV 1980). In its entirety, the provision reads:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

[101] *But cf.* 29 U.S.C. § 633a(d) (1976 & Supp. V 1981) (federal employees alleging discrimination under the Age Discrimination in Employment Act need only give notice to appropriate federal official of intent to sue; pursuit of administrative remedies is optional); Ososky v. Wick, No. 82-1043, slip op. at 4-7 (D.C. Cir. Apr. 8, 1983) (under Equal Pay Act, in contrast to Title VII, federal employee is not required to seek administrative relief before commencing civil action in court). *See generally* Ralston, *The Federal Government as Employer: Problems and Issues in Enforcing the Anti-Discrimination Laws*, 10 GA. L. REV. 717, 724-34 (1976).

agency initiate his or her complaint with the agency. Nor is the requirement a technicality. Rather, it is part and parcel of the congressional design to vest in the federal agencies and officials engaged in hiring and promoting personnel "primary responsibility" for maintaining nondiscrimination in employment. *See* 42 U.S.C § 2000e-16(e) (1976 & Supp. IV 1980); *Brown v. GSA*, *supra*, 425 U.S. at 832.

Because Congress has unambiguously directed federal employment discrimination complainants to proceed first before the agency charged with discrimination, we have grave doubts whether any futility doctrine can be stretched to sanction court adjudication of a Title VII action when no party to the action has ever filed an initial charge with the agency.[102] In any event, the complainants

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[102] *See infra* note 104 and accompanying text.

The Kizas complainants cite Davis v. Bolger, 496 F.Supp. 559 (D.D.C. 1980), as an instance in which a court applied to a federal sector Title VII claim the rule that "where recourse to agency procedures would be futile because the agency's position is firm a litigant need not first exhaust his administrative remedies before bringing his case to court." *Id.* at 567. But the extraordinary context in which the *Davis v. Bolger* court made this statement has no parallel in this case.

The plaintiff in *Davis* made two routine Title VII claims: he alleged that he was denied a promotion because of his race and sex and that he was the subject of reprisals *after he filed his EEO complaint*. The *Davis* plaintiff, in short, did not bypass the charge-filing requirement.

In his court complaint, however, the *Davis* plaintiff included a third, more novel claim that had not been presented initially to the Postal Service. He assailed the Postal Service's practice, then followed in other federal agencies as well, of paying Postal Service employees who attended Title VII trials as witnesses for the defense for time spent in court, but requiring employees who served as witnesses for Title VII plaintiffs to attend court on their own time. The *Davis* court held that this practice violated Title VII, construed "in conjunc-

before us have not demonstrated cause to excuse their total bypass of the regulations governing the initiation of Title VII charges by federal employees.

The Kizas complainants cite their counsel's April 18, 1978, letter to the Bureau Director as fair notice to the agency of their grievance. *See* Brief for Appellants at 24 n.14; letter from Philip L. Chabot, Jr. to William H. Webster (April 18, 1978), *reprinted in* II JA at 425-26. But this letter, sent several months after the FBI established the new selection tracks for women and minorities, protests only the retraction of the preference once accorded the class of clerical employees to which the complainants here belong; the letter says nothing at all about sex or race discrimination at the Bureau. The Kizas complainants further contend that at the administrative level corrective action pursuant to Title VII is envisoned only "as to complaints involving acts of individual discrimination rather than approved programs the discriminatory effect of which is class wide." Brief

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tion with 5 U.S.C. § 6322," which "provides on its face for paid leave for a witness summoned 'on behalf of any party.'" *Id.* at 566. The Postal Service had argued, inter alia, that "witnesses who wish to be paid must first file an EEO claim and exhaust their administrative remedies." *Id.* at 567. In rejecting this argument, the court specifically noted: "It is not at all clear that witnesses themselves would have administrative remedies under EEO procedures, since they could not allege discrimination of the type prohibited by Title VII against themselves." *Id.* at n.34.

Davis, in sum, does not aid the Title VII plaintiff who proceeds directly to court on a race or sex discrimination claim. It is simply an example of an altogether appropriate readiness of courts to avoid excessively technical interpretations of the statute. *See, e.g.*, Gupta v. East Texas State Univ., 654 F.2d 411, 414 (5th Cir. 1981) (plaintiff who filed EEOC charge complaining of discrimination based on religion and national origin could assert in civil action on that claim an ancillary claim, not filed with the EEOC, for retaliation growing out of the original charge). *See also* Gordon v. National Youth Work Alliance, 675 F.2d 356, 360 (D.C. Cir. 1982).

for Appellants at 28. This contention is insubstantial. Regulations implementing section 717(b) specifically provide for the processing of class complaints. *See* 29 C.F.R. § 1613.603 (1982). *See also id.* § 1613.602(a) (more generous time limitation for invoking agency processes when employee or applicant "wishes to be an agent").

Nor does the Supreme Court's decision in *Zipes v. Trans World Airlines, Inc.*, *supra*, bear the weight the Kizas complainants would place on it. *Zipes* posed the question "whether the statutory time limit for filing charges under Title VII . . . is a jurisdictional prerequisite to a suit in the District Court." 455 U.S. at 387. In the context of a private sector Title VII claim, the Court explained in *Zipes* that "the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the district court." *Id.* at 397. We have held that the *Zipes* analysis is applicable to *time limitations* for filing administrative charges in federal employment discrimination cases. *Saltz v. Lehman*, 672 F.2d 207, 208 (D.C. Cir. 1982) (per curiam); *accord Milam v. United States Postal Service*, 674 F.2d 860, 862 (11th Cir. 1982).[103] But nothing in *Zipes* suggests that parties complaining of federal employment discrimination in violation of Title VII should ever be waived into court without filing *any* initial charge with the agency whose practice is challenged. The Court in *Zipes* stressed that the charge-filing provision applicable to private sector claims, 42 U.S.C. § 2000e-5 (e) (1976), "appears as an entirely separate provision"; "it does not . . . refer in any way to the jurisdiction of the district courts." 455 U.S. at 394. In contrast, section 717(c), governing federal employment discrimination

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[103] Indeed, even before the Supreme Court's decision in *Zipes*, this court viewed Title VII's time provisions as subject to equitable modification. *See* Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 474-75 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

claims, does tie together initial recourse to the agency and subsequent recourse to a district court.[104]

The absence of precedent for skipping entirely over the "initial charge" requirement in federal sector cases is not surprising, for lower courts must heed the Supreme Court's admonition that section 717 "does not contemplate merely judicial relief. Rather, it provides for a careful blend of administrative and judicial enforcement powers." *Brown v. GSA*, *supra*, 425 U.S. at 833. Were we to embrace the futility or waiver arguments the Kizas complainants press and hold "unnecessary"[105] an initial charge filed with the FBI, we would sanction erosion of "the carefully structured scheme for resolving charges of discrimination within federal agencies." *Porter v. Adams*, *supra*, 639 F.2d at 277.

2. The Manning initial charge

Shortly before the district court denied the Kizas complainants' motion for reconsideration of the Count II disposition, *see supra* note 93, counsel for the Kizas complainants discovered that a clerical employee adversely affected by the NSASS, Robert B. Manning, had filed an initial charge with the FBI.[106] Several months after the Bureau's Equal Employment Opportunity Officer notified Manning that the FBI had rejected his complaint of race

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[104] For the full text of section 717(c), 42 U.S.C. § 2000e-16(c) (1976 & Supp. IV 1980), see *supra* note 100. In Porter v. Adams, *supra*, 639 F.2d at 276, the Fifth Circuit considered the matter and concluded: "The exhaustion requirement . . . is found in § 717(c) and is an absolute prerequisite to suit under that section." *But cf. supra* note 101.

[105] Brief for Appellants at 24.

[106] Manning's administrative complaint alleged that he was passed over in favor of less qualified applicants drawn from the women's and minorities' selection program. *See* Attachments to Memorandum to Court Addressing New Evidence of Plaintiffs' Exhaustion of Administrative Remedies (filed Apr. 23, 1980), *reprinted in* I JA at 141, 148.

and sex discrimination,[107] Manning commenced a civil action challenging the NSASS. *Manning v. Webster*, No. 79-3429 (E.D. La. filed Sept. 5, 1979).[108] Manning's court complaint appears to be patterned on the Kizas amended complaint, filed more than six months earlier, on February 22, 1979. However, Manning did not seek to represent a class.[109] Apparently because Manning had independently filed suit in the court of his choice on his own behalf, the Kizas complainants successfully moved in the district court to sever Manning from their Count II class claim.[110]

The Kizas complainants assert that the FBI's disposition of Manning's charge shows that any similar charge they might have filed would have been unavailing. We find this hindsight justification inadequate to relieve the complainants before us of the charge-filing requirement. The alleged 1980 discovery that Manning had filed a charge does not explain or excuse the Kizas complainants' bypass of the agency in 1978, when they instituted this action, or in 1979, when they amended their complaint to add Count II.

The Kizas complainants further contend that Manning's charge should count for all members of the class they describe. They correctly observe that "[n]ot every member of a class need independently exhaust adminis-

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[107] *Id.* at 145-46.

[108] Manning initially requested a hearing before a complaints examiner, but withdrew the request a few weeks before he commenced his court action. *Id.* at 151.

[109] On January 29, 1980, on joint motion of Manning and the Bureau, Manning's action was stayed pending either decertification of the class or final adjudication in the Kizas action. Manning v. Webster, *supra* (order staying proceedings), *reprinted in* I JA at 171.

[110] The motion was made on October 23, 1980, and was granted by order filed November 19, 1980. District Court Civil Docket Sheet, *reprinted in* I JA at 1, 17.

trative remedies prior to seeking judicial relief." Brief for Appellants at 25; *see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975). This court has held that "where two plaintiffs allege that they were similarly situated and received the same discriminatory treatment, the purposes of the exhaustion requirement are adequately served if one plaintiff has filed an [administrative] complaint." *De Medina v. Reinhardt*, 686 F.2d 997, 1013 (D.C. Cir. 1982). While a Title VII plaintiff may thus escape the administrative charge-filing requirement by joining with an individual, similarly situated, who has filed a charge, *Foster v. Gueory*, 655 F.2d 1319, 1322 (D.C. Cir. 1981), there is no such joinder in this case.

Manning was severed from the Count II class. Neither a named representative, nor any person purportedly represented by named parties is alleged to have observed the charge-filing requirement. No authority has come to our attention supporting the argument that named class representatives, having bypassed initial recourse to administrative relief, may bootstrap their class claim on the independently-filed charge of a similarly situated individual who subsequently pursues his own lawsuit in a different forum.

It is the general rule that initial pursuit of administrative relief by at least one class member is a prerequisite to the maintenance of a class action against a federal agency even in cases in which a charge-filing requirement comparable to Title VII's is not mandated. *See Phillips v. Klassen*, 502 F.2d 362, 369 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974); *League of United Latin American Citizens v. Hampton*, 501 F.2d 843, 847 & n.1 (D.C. Cir. 1974); *Marrone v. INS*, 500 F.2d 418, 420 (2d Cir. 1974) (per curiam). The Kizas complainants invite us to relax that minimal ("at least one") requirement in a Title VII case, an area in which the requirement has special force and importance. They do so by citing, belatedly, a charge filed by an individual who

never purported to act on behalf of a class before the agency, moreover, one who has selected another judicial forum for pursuit of his individual employment discrimination claim. We would undermine both Title VII's initial charge-filing requirement for federal sector claims and appropriate limitations on class actions were we to accept the argument tendered.[111]

CONCLUSION

For the reasons stated, in Number 82-1477, we reverse the judgment for the employees on the "takings" claim and direct the district court to enter judgment for Webster *et al.*; in Number 82-1511, we affirm the judgment dismissing the employees' discrimination claim.

It is so ordered.

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[111] As a final argument, the Kizas complainants urge that even if they could not pursue Title VII relief in an independent action because they failed to file a charge with the FBI, the district court nevertheless should have decided their race and sex discrimination class claim as a matter "ancillary" to their Count I claim. The district court held that the exercise of ancillary jurisdiction would be "inappropriate" in this case. Opinion II, 492 F.Supp. at 1153; *see* Morrow v. District of Columbia, 417 F.2d 728, 740 (D.C. Cir. 1969). That ruling is unquestionably correct. The concept of "ancillary" jurisdiction is not properly invoked to circumvent Title VII's firm charge-filing requirement for federal employees. Moreover, our disposition of the takings count leaves no principal action to which the discrimination count could be linked.

APPENDIX B

[Filed FEB 15 1980]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-983

ADOLPH KIZAS, *et al.*,

Plaintiffs,

v.

WILLIAM H. WEBSTER, *et al.*,

Defendants.

MEMORANDUM

I

A.

This case involves the adoption of a new system in April, 1977, for the selection of Special Agents ("SA") for the Federal Bureau of Investigation and the removal of a preference formerly accorded clerical employees for consideration for positions as Special Agents. Named plaintiffs are 48 individuals who were employed in clerical positions on or before the adoption of the New Special Agent Selection System ("NSASS"). They allege that abrogation of the preference constituted a taking from them of valuable property rights in violation of the fifth amendment. In an amended complaint, plaintiffs also allege that as an integral part of the NSASS, the FBI instituted an affirmative action program that permitted minorities and women to meet the initial requirements for qualification as SA by achieving a lower score than was

required of other applicants, including clerical employees. Plaintiffs contend that implementation of NSASS constituted discrimination against them in violation of their right to equal protection as applied to the federal government through the fifth amendment. Plaintiffs seek declaratory and injunctive relief as well as money damages against defendants William H. Webster and Clarence Kelley, respectively the present and immediate past directors of the FBI, who were sued in their official and individual capacities.

On May 15, 1979, this Court certified the case as a class action. The class was defined as clerical and support employees who entered FBI service before April 19, 1977, who were interested in positions as SA's and who understood as a condition of their employment that once they had met certain minimum requirements, they would be given preferential consideration for those positions. After briefing and oral arguments on the parties' cross-motions for summary judgment, the Court issued an Order on July 5, noting its conclusion that (a) a cause of action may be directly implied under the Constitution for violations of the fifth amendment alleged in this case; and (b) plaintiffs were not precluded from pursuing their constitutional claims based upon alleged violations of equal protection. The Court requested further briefing on a number of issues, in part to consider the implication of the Supreme Court's decision in *United Steelworkers of America v. Weber*, _____ U.S. _____, 47 U.S.L.W. 4851 (June 27, 1979), decided a few days before oral argument, and to clarify the evidence with respect to the existence of an allegedly protected interest of plaintiffs and to supplement the record with respect to the immunity issue.

The Court has concluded on the basis of material facts not in dispute that plaintiffs are entitled to summary judgment and to a declaratory judgment with respect to their claim of a protected property interest; defendants are immune from damage liability in their individual capacities. The motions of both parties for summary judgment on the equal protection and Title VII claims are denied and dismissed as unnecessary for the Court to resolve.

By accompanying Order, the Court has scheduled a status conference at which the parties shall address the standards to measure plaintiffs' damages and the appropriate procedure and forum for adjudicating the damage claims in light of the limits imposed upon this Court's jurisdiction by the Tucker Act, 28 U.S.C. §1491 (1976).

B.

Background:

At the time the FBI employed plaintiffs, and for a substantial time before that, the FBI had in place a system by which a person could become a Special Agent through any one of five qualifying programs that were based on prior education and experience as: (1) an accountant; (2) a lawyer; (3) a scientist; (4) a language specialist; or (5) having accumulated three years of professional, executive, complex investigative or other specialized experience following four years of college (the so-called modified program). The Bureau regarded satisfactory service as a clerical support employee as equivalent to other specialized experience; similar clerical experience outside the Bureau did not qualify as other specialized experience.

Prior to April, 1977, the modified program was subdivided into two distinct groups: Bureau clerical employ-

ees and non-Bureau employees. When a Bureau employee satisfied the threshold requirements for the SA position —including age, a college degree, a drivers license, and the requisite service as a clerical employee—he was scheduled for further processing. This processing included written examinations, an interview, a physical examination and a background investigation. The Bureau graded performance on these tests on a pass/fail basis. Bureau employees who passed all phases of the examinations were considered fully qualified for appointment and were assigned a chronological ranking, based upon their date of qualification. The Bureau employed this ranking to select clerical employees for consideration as Special Agents when appointments were made from the modified program. Other modified program applicants were not given the benefit of the chronological ranking.

Although this special program for Bureau support staff was modified in some particulars over the years, its essential features remained unchanged until April, 1977. At that time, former Bureau clerical employees constituted twenty percent of all Special Agents on duty.

On April 19, 1977, the FBI implemented the "New Special Agent Selection System." The NSASS differed from the former selection system in two important respects: first, this system eliminated pass/fail examinations and the chronological ranking from which clerical members of the modified class were formerly selected and substituted a system in which all applicants were ranked competitively based on their combined test and interview scores, regardless of their date of qualification; second, the new system added two new selection programs, one for women and one for minority groups.

For each selection program, the Bureau now sets a minimum score required to qualify for an interview. The

combined test and interview scores are used to select applicants from each category. The Bureau sets the minimum scores for each category on the basis of the number of applicants in each program pool. Although the minimum scores are adjusted periodically, at all times since the NSASS was adopted, applicants in the modified program, which is composed overwhelmingly of Bureau employees, have been required to achieve the highest test score of applicants in any program in order to qualify for an interview.

Plaintiffs do not claim that the former system accorded them an absolute right to become Special Agents, regardless of their qualifications or the needs of the Bureau. Nor do the defendants deny that members of plaintiffs' class have fared less well under the NSASS. The assertions of the parties are more discreet: plaintiffs maintain that the former "objective method" of testing and qualification[1]—premised on pass/fail examinations and chronological ranking—guaranteed them a "preference" for consideration as Special Agents which was a valuable incident to their employment as support personnel. They assert that this preference was a valuable property right arising through implied contract and protected by the fifth amendment. They also allege that the particulars of the NSASS violate the constitutional guarantee of equal protection.

Defendants do not dispute the existence of the former selection policy. Their description of the policy does not differ from plaintiffs' in any material respect. However, defendants dispute the conclusion that the policy consti-

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[1] The policy was so characterized by defendants in the Affidavit of Joseph Doyle Powell, filed June 14, 1979, at ¶17 [hereinafter Powell Affidavit].

tuted a preference to clerical employees. Defendants maintain, moreover, that however the policy is characterized, the Bureau was legally free at any time to alter it without hearing or compensation to those affected. Defendants deny that the NSASS impermissibly discriminates against plaintiffs on account of their race or gender.

Findings of Fact:

II

A.

1. For many years prior to April, 1977, the Bureau maintained a special program by which clerical employees could qualify for positions as Special Agents. The Bureau never formally codified the program by regulation or its equivalent. However, this policy was generally known throughout the Bureau, and was communicated to prospective clerical employees through defendants' agents charged with recruiting new clerical employees.[2] The Bureau further made the policy known by promulgating changes in the program by official memorandum.[3]

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[2] Deposition of Joseph Doyle Powell, December 8, 1978, at 8-12, 17-19, 152, 155 [hereinafter Powell Deposition]; Deposition of William J. Dawson, January 31, 1979, at 9-11, 16, 76-77; Affidavit of John F. Bonney, filed May 29, 1979, at ¶2 [hereinafter Bonney Affidavit]; Affidavit of Adolph Kizas, filed May 29, 1979, at ¶9 [hereinafter Kizas Affidavit].

[3] *See, e.g.*, Dawson Deposition at 70-73; Memorandum to All Special Agents in Charge ("SAC Memorandum"), Memorandum 7-73, dated February 13, 1973, filed as Exhibit 3 to Plaintiffs' Consolidated Exhibits in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion to Dismiss or in the Alternative for Summary Judgment, filed May 29, 1979 [hereinafter "Pl. Con. Ex."].

2. The Special Agent Pre-Employment Task Force of the Bureau summarized the mechanics of the program as follows:

> The basic prerequisites of the support program as it exists today consist of the employee possessing a four-year resident college degree, reaching age 23, serving three years in a support capacity, and being favorably recommended during the course of a formal interview by both his division head and a representative of the Inspection Staff. Upon attaining these pre-requisites and having maintained an acceptable work record as a support employee, he is listed chronologically with other support employees that have achieved these basic prerequisites. The employee is then afforded the SA written examinations which are given to all applicants under the Modified Program. Upon receiving passing grades on these tests, he will be afforded a complete physical examination at a Government medical facility and, upon being certified for strenuous physical exertion, will be assigned to a New Agents Class dependent upon our needs and vacancies.[4]

3. The Bureau maintained a list of support employees who had fully qualified for Special Agent consideration in all respects in chronological order based upon the date of qualification. The Bureau made all appointments as Special Agents from among clerical employees qualifying through the Modified Program in order from this list.[5]

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[4] Special Agent Pre-Employment Selection System Task Force Findings, March, 1977, at 20, filed as Pl. Con. Ex. 15 [hereinafter Task Force Findings].

[5] Powell Deposition at 21, 95; Dawson Deposition at 76-78; Answer to Amended Complaint, February 28, 1979, at ¶¶8-9;

[footnote continued]

4. Other applicants in the Modified Program from outside the Bureau did not receive the benefit of this chronological ranking.

5. The ability of support employees to qualify for Special Agent consideration by the "objective method" based on pass/fail examinations and chronological ranking constituted a valuable benefit to clerical employees in a number of respects: first, it assured employees who had met the minimum qualifications that they would be considered for appointment on the basis of seniority; second, when Special Agent classes had to be filled on short-notice, the existence of a listing of qualified applicants gave clerical employees a substantial practical advantage over non-Bureau applicants, whose availability and qualifications could not be so easily and quickly ascertained;[6] third, the procedure afforded the clerical employees an opportunity to meet all qualifications before vacancies were available, thus reducing a prospective applicant's uncertainty about whether he met SA qualifications and providing an early opportunity to cure deficiencies; fourth, the Modified Program permitted Bureau employees to qualify for appointment on the basis of work experience that would not meet the minimum requirements for entrance under the Modified Program if obtained outside the Bureau; and, fifth, the selection procedure guaranteed to a clerical employee that once qualified for appointment, he could not lose his position on the appointment list to a subsequent applicant, even if that applicant was subjectively better qualified.

Defendants' Answers to Plaintiffs' First Interrogatories, filed October 30, 1978, at No. 2 [hereinafter Defendants' Answers to Interrogatories]; Kizas Affidavit; Bonney Affidavit.

[6] Powell Deposition at 24.

6. The Bureau recognized that the program for clerical employees was an exception to its normal policy of competitive recruitment of Special Agents and conferred a preference to those employees.[7]

7. The Bureau made the former selection program known to prospective employees through Special Agents in field offices who were directed to and did recruit persons for clerical positions.[8]

8. The Bureau actively fostered expectations by its clerical employees that upon meeting the minimum qualifications for Special Agent, they would be given preferred consideration for appointment. The clerk-to-agent program was specifically listed in the Bureau's upward mobility manual.[9] It was the stated policy of the Bureau to promote from within, except where a specific skill was required.

On two separate occasions when the Bureau altered aspects of the Modified Program, it expressly made these changes prospective only. In a Memorandum to All Special Agents in Charge (SAC), dated February 13, 1973, the Bureau specifically excepted clerical employees then on duty from a change in the required period of Bureau

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[7] Pl. Con. Ex. 10, Memorandum for the Director, dated March 31, 1976; Pl. Con. Ex. 15, Task Force Findings, at 21-22.

[8] Kizas Affidavit at ¶9; Bonney Affidavit at ¶2; Powell Deposition at 7; *see also* notes 21-24, *infra.*

[9] Pl. Con. Ex. 2 at page iii: "After gaining experience over a stipulated period of time . . . and after meeting certain basic requirements including education, non-Agent personnel are eligible for consideration for the Special Agent position . . . ."

[footnote continued]

employment from two to three years, and a reduction of the maximum age for applicants to 36 years.[10]

Similarly, defendant Kelley, in a memorandum dated May 18, 1976, excepted clerical employees interviewed prior to March 2, 1976, from a requirement that clerical employees receive an overall interview rating of "outstanding" (rather than "above average") in order to be considered for SA through the Modified Program.[11]

9. Many college graduates, otherwise over-qualified for clerical positions, entered service with the express purpose of qualifying for the Special Agent position through the Modified Program.[12] Many of these persons would not have accepted clerical positions or maintained employment were it not for their expectation that the program would continue.[13]

10. The defendants were aware that many college graduates accepted support positions with the express

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The policy is described at page 2 as "an integral part of its centralized personnel assignment, promotion and advancement administration." "Action Item D," at 3, calls for dissemination of Upward Mobility plans through posting, conferences, and counselling. *Id.*

[10] Pl. Con. Ex. 3, SAC Memorandum 7-73, dated February 13, 1973.

[11] Pl. Con. Ex. 11, Memorandum 21-76, dated May 18, 1976.

[12] Kizas Affidavit at ¶¶10-13; Bonney Affidavit at ¶3; *see* note 25, *infra.*

[13] Kizas Affidavit; Bonney Affidavit. Pl. Con. Ex. 14, Memorandum from W.K. DeBruler to the Director, dated December 16, 1976, states that "the active recruitment of college graduates into lower-level clerical positions for eventual assignment to the position of SA" was Bureau policy.

purpose of qualifying for Special Agent through the Modified Program.[14]

11. At various times subsequent to 1972, certain documents contained disclaimers with respect to the possibility of a clerical employee becoming an SA, and, on one occasion, officials were directed to deliver oral disclaimers to clerical applicants.[15] These statements, however, suggested only that there could be no guarantee (1) that a clerical employee would become an SA "regardless of qualification";[16] (2) that the minimum requirements applicable to all SA candidates would remain the same;[17] or (3) that because of the number of vacancies available, a clerical employee would be considered for appointment after serving three years in a clerical position.[18]

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[14] Dawson Deposition at 6; Pl. Con. Ex. 14, *supra*; Pl. Con. Ex. 9, Memorandum to All Special Agents in Charge No. 14-75, dated March 27, 1975 "Many [college graduates] enter our [clerical] service with the express purpose of later qualifying for the Special Agent position"; Pl. Con. Ex. 11, SAC Memorandum 21-76, dated May 18, 1976; Pl. Con. Ex. 31, Memorandum from W.O. Cregar to R.E. Long, dated October 24, 1978, at 2.

[15] *See generally* Pl. Con. Ex. 9, SAC Memorandum 14-75.

[16] *See id.*; Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss, *etc.*, May 3, 1979, at 13.

[17] *See* Defendants' Answers to Interrogatories, *supra* note 5, Exhibits 1A-1F, "Information Concerning the Position of Special Agent in the Federal Bureau of Investigation." After describing the specific requirements for qualification as SA, this brochure, published between June, 1969, and August, 1972, cautioned that "[n]o assurance can be given . . . that these requirements will remain in effect."

[18] *See* Pl. Con. Ex. 9, SAC Memorandum 14-75; Exhibits to Defendants' Memorandum of Points and Authorities in Opposition to

[footnote continued]

None of these disclaimers or reservations was in any way inconsistent with the existence of the preference for clerical employees as it was widely understood; and none of these acts by the Bureau in any way suggested or put plaintiffs on notice that the preference would be removed.[19]

12. At the time of plaintiffs' employment and beyond April, 1977, the Bureau had a need for clerical employees that was described on more than one occasion as "dire."[20]

13. In order to meet the need for clerical employees, the Bureau undertook active recruitment efforts, including the deployment of SA's for full-time recruitment activities,[21] recruitment quotas for each field office,[22] and cash bonuses for specific recruitment efforts.[23] The Bureau considered recruiting to be an aspect of each Special

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Plaintiffs' Motion for Summary Judgment, June 14, 1979, [hereinafter "Def. Ex."], Exhibit 13 (Application Form FD-140); Def. Ex. 14 (Applicant Interview Form FD-190).

[19] *See* Powell Deposition at 99-101, 122-23; Dawson Deposition at 75. In this regard, it is noteworthy that the Memorandum from defendant Kelley implementing the use of formal disclaimers in March, 1975, *see* note 18, *supra*, simultaneously ordered that 50 percent of all Special Agent classes should be set aside for members of plaintiffs' class.

[20] Pl. Con. Ex. 5, SAC Memorandum 6-74, dated February 5, 1974; Pl. Con. Ex. 6, Memorandum 39-74, dated August 13, 1974; Pl. Con. Ex. 21, Memorandum from S.R. Burns to Mr. Long, dated November 8, 1977.

[21] Pl. Con. Ex. 6.

[22] Defendants' Answers to Interrogatories, No. 13; Powell Deposition at 102-03.

[23] Powell Deposition at 41-43, 103-05.

Agent's duties, regardless of whether he was assigned specific recruitment tasks.[24]

14. In part to fill this need, the Bureau actively recruited college students and graduates for lower-level support and clerical positions (GS-2 and above).[25] The employment of many of these persons was at a grade level below that which their education and experience would ordinarily have qualified them.[26]

15. The Bureau knew that Special Agents, in the course of recruiting clerical and support personnel, made promises of special treatment for clerical employees with regard to Special Agent consideration that may have exceeded the preference in fact accorded by regular Bureau policy.[27]

16. On December 3, 1976, 219 support personnel had met the qualifications for consideration as Special Agents through the Modified Program under the former selection system.[28]

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[24] Defendants' Answers to Interrogatories, No. 3; Powell Deposition at 7.

[25] Pl. Con. Ex. 14, Memorandum from W.K. DeBruler to the Director, dated December 16, 1976.

[26] Dawson Deposition at 6-8; Powell Affidavit at ¶30.

[27] Pl. Con. Ex. 8, Memorandum from R.G. Hunsinger to Mr. Walsh, dated March 10, 1975; Pl. Con. Ex. 9, SAC Memorandum 14-75, dated March 27, 1975; Pl. Con. Ex. 10, Memorandum to the Director from William L. Reed, dated March 31, 1976.

[28] Powell Deposition at 9-12, 17-19, 152; Pl. Con. Ex. 13, Memorandum from S.R. Burns to Mr. Long, dated December 3, 1976.

B.

17. On April 15, 1977, defendant Kelley adopted and in October of that year implemented the NSASS.[29]

18. The new system had been recommended by a Task Force appointed by Kelley. Its 16 members represented the Training, Finance and Personnel, Planning and Transportation, and Legal Counsel Divisions of the Bureau and six separate field divisions. Its mandate was to evaluate selection procedure for Special Agents and recommend changes.

19. The purpose of the new system was to ensure that only the best qualified Special Agent applicants are ultimately chosen for that position.

20. The NSASS eliminated the chronological ranking and selection of clerical employees qualified for the SA position. The Task Force considered and rejected a proposal that this change be implemented prospectively, in order to protect clerical employees who had qualified under the former selection procedure.[30]

21. The NSASS established seven selection programs consisting of the five former qualifying programs and, in addition, one each for minorities and females.

22. Under the NSASS, testing for the position of Special Agent is divided into a written examination and oral interview.

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[29] Pl. Con. Ex. 15, SAC Memorandum 16-77, dated April 15, 1977; Pl. Con. Ex. 17, Memorandum to All Employees, dated April 19, 1977; Pl. Con. Ex. 15, Task Force Report; Pl. Con. Ex. 19, SAC Memorandum 29-77, dated July 20, 1977; Powell Deposition at 152.

[30] Pl. Con. Ex. 18, Memorandum from S.R. Burns to Mr. Long, dated May 23, 1977.

23. An applicant may score 50 points on the written test with an additional 5 points available to veterans.

24. In order to qualify for an interview, an applicant must attain a score equal to or greater than the minimum cut-off score for the relevant selection category. The minimum cut-off score for each category is determined by subtracting the maximum interview score (55) from an average appointment score by selection program. In practice, therefore, the score required to obtain an interview will depend upon the number of persons to be appointed from a particular selection program, the performance of other members of the selection group, and the number of applicants in that program.

25. As of November 8, 1978, and March 1, 1979, the cut-off scores for each selection category were as follows:[31]

	Nov. 8, 1978	*March 1, 1979*
Female	31.50	31.50
Minority	31.50	31.50
Accounting	32.32	32.21
Law	32.44	32.90
Science	32.08	33.62
Language	35.08	31.50
Modified	37.38	38.94

26. Although the minimum qualifying score is adjusted every six months, the minimum qualifying score for the modified group has always been the highest of all the selection categories.[32]

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[31] Pl. Con. Ex. 32, Memorandum from S.R. Burns to Mr. Long, dated November 8, 1978; Pl. Con. Ex. 35, Memorandum to all Field Offices.

[32] Pl. Con. Ex. 30, Memorandum from R.E. Long to Mr. McDermott at 6, 7, 14-16.

27. Between 1960 and 1972, the number of black Special Agents was less than one percent of the total number of agents; between 1973 and mid-1979, the percentage of black Special Agents had risen from one percent to 2.55 percent. No female Special Agents were permitted before 1972; since then, the percentage of female Special Agents has risen to 2.18 percent.[33]

Conclusions of Law:

III

A.

The elements giving rise to a property interest protected by the Constitution have been frequently stated:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it . . . .

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The authority is clear that such a property interest can be established by mutual understanding between employer and employee even in the absence of a written contract.[34] According to the Court of Appeals in *Colm v. Vance*, "the source of a protected property right might be implicit in the overall workings of a government employer." 567 F.2d at 1128. This understanding may be found from "the objective indicia supporting such a claim in a governing statute, regulation, or in agency-fostered policies or understandings." 567 F.2d at 1131.

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[33] Affidavit of Don S. Tokunga, July 18, 1979.

[34] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972); Ashton v. Civiletti, No. 76-1142 (D.C. Cir. October 4, 1979); Colm v. Vance, 186 U.S. App. D.C. 132, 567 F.2d 1125 (1977).

Were this a dispute between a private employer and its employees, the Court would have no difficulty finding that the representations made by the defendants to the plaintiffs gave rise to an implied contract. For many years, defendants maintained a clearly understood and well-known policy according to plaintiffs and their predecessors, a preference in selection for positions as Special Agents. Special Agents in FBI field offices, whose duties specifically included recruitment of clerical employees, and who were rewarded for their recruitment efforts, communicated the existence and essential elements of the clerk-to-agent program to prospective employees. Many individuals accepted clerical positions in express reliance on the program.

Once these individuals joined the Bureau, their reliance on this policy was actively reinforced. The Bureau listed the program in its upward mobility manual. The defendants' conduct in altering the policy only prospectively gave plaintiffs every reason to suppose that the preference would continue, and was entirely consistent with a conclusion that the defendants also so understood the policy.

In return for this preference, the Bureau was rewarded with the services of highly-qualified and highly-motivated persons willing to serve for a substantial period of time in relatively menial positions, lower in challenge, pay, and status than plaintiffs might have enjoyed elsewhere. These services were especially useful to the Bureau, because throughout this period, it had "dire" need for more clerical employees. The history of representation, reliance, and mutual exchange of benefits contains all the

elements of a classic contract implied in fact[35] or of promissory estoppel.[36]

The fact that the employer in this case is the government and that the issues are phrased in terms of a violation of rights guaranteed by the fifth amendment does not alter either the result or the analysis. To secure fifth amendment protection, an interest need not have any special "constitutional" character; rather, constitutional protection is accorded interests that are derived independently from such sources as state law or contract. *Board of Regents v. Roth*, 408 U.S. at 567; *Perry v. Sindermann*, 408 U.S. at 603-04 (Burger, C.J., concurring). A contract right, such as the one at issue here, is plainly property for the purposes of the fifth amendment, *Perry v. Sindermann*, 408 U.S. at 601-602, which the government cannot destroy without due process[37] or just compensa-

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[35] *See, e.g.*, 3 A Corbin on Contracts §§561-567 (1960); 1 Williston on Contracts §§3, 17-21 (3d Ed. 1961). It is well-settled that contracts of employment may be modified by usage, *see* 5 Williston §652, or the "common law" of a particular industry, *see* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579-80.

[36] *See* Restatement (Second) of Contracts §90 (Tent. Draft No. 2 1965):

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

[37] The gravamen of plaintiffs' complaint is not that they were denied a hearing or other process, but that they were deprived of a benefit to which they had an absolute entitlement. Their substantive claim makes the issue of process essentially irrelevant, *compare* Ashton v. Civiletti, Slip Op. at 7-8, since they concede no cir-

[footnote continued]

tion.[38]

Nor is there any longer any doubt that the Government, like any private person or institution, can in certain circumstances be bound through principles of estoppel and implied contract. Both the Supreme Court and the Court of Appeals for this Circuit have had the opportunity to address this issue in recent weeks. *See Hatzlachh Supply Co. v. United States*, 48 U.S.L.W. 4124 (January 21, 1980); *Molton, Allen & Williams v. Harris*, No. 78-1708 (D.C. Cir. January 7, 1980).

Molton reaffirmed that the restrictive rule of *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947), that the government cannot be estopped by the unauthorized actions of an agent, does not apply where the government agent acts within his authority:

> Unless as in *Merrill* there is a statute or regulation to the contrary, the government is subject, when it enters the domain of commerce, to the same principles of justice that govern private parties.[39]

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cumstances or grounds, which might be developed at a hearing, that would justify the termination of their vested rights to a preference.

[38] *See* Lynch v. United States, 292 U.S. 571, 579 (1934); United States v. Northern Colorado Water Conservancy District, 449 F.2d 1, 3-4 (10th Cir. 1971) (abrogation of implied contract by United States gives right to just compensation).

[39] Slip Op. at 6. There can be no doubt that this rule applies as well to employment situations. Were it otherwise, the conclusion that a contractual property right may arise by implication from "words and conduct", Perry v. Sindermann, 408 U.S. at 602, *quoting* 3 A. Corbin on Contracts §562, would be without meaning. *See also* Ashton v. Civiletti. Nor can there be any doubt in the in-

[footnote continued]

The Court of Appeals went on to find waiver of a condition precedent from, *inter alia*, "inferences from the words and actions of the parties," Slip Op. at 7, industry custom, *id.* at 8, and principles of equity, *id.* at 10, *citing* 5 Williston on Contracts §679 (3d ed. 1957), *Hatzlachh*, a case involving an implied contract of bailment, reaffirmed that even in the absence of statutory tort liability, the United States may be liable on contracts implied in fact. 48 U.S.L.W at 4125. As was succinctly stated by Chief Justice Waite more than a century ago:

> The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them.[40]

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stant circumstances that Special Agents expressly authorized—indeed, required—to recruit clerical personnel had authority to explain to potential clerical employees the dimensions of existing Bureau policy. *See* Finding of Fact No. 13, *supra*. Addressing a similar situation in Baker v. F & F Investment Co., 489 F.2d 829, 834 (7th Cir. 1973), the Seventh Circuit held *Merrill* inapplicable where the representations at issue were "in accordance with agency policy rather than contrary thereto." The Court has no occasion to consider whether promises to potential clerical employees in excess of Bureau policy, *see* Finding of Fact No. 15, *supra*, would bind the Bureau. These types of representations might well fall within the *Merrill* rule. However, the contract the Court finds herein is based on express Bureau policy, not any *ad hoc* representations. Since the rationale of *Merrill* is, *inter alia*, to charge citizens dealing with the government with knowledge of government policy, *see Molton*, Slip Op. at 5-6, it would be error to hold that *Merrill* prevents the plaintiffs from relying on accurate representations of existing policy made by authorized agents.

[40] United States v. Bostwick, 94 U.S. 53, 66 (1877); *see also* Reading Steel Casting Co. v. United States, 268 U.S. 186 (1925); Algonac Manufacturing Co. v. United States, 428 F.2d 1241 (Ct. Cl. 1970); Gay v. United States, 356 F.2d 516, 524 (Ct. Cl.) *cert. denied*, 385 U.S. 898 (1966).

These most recent cases, as well as the authority upon which they rely, stand for the proposition that in its dealings with its citizens, the government is obligated to deal squarely, and that courts will enforce these obligations. As Justice Jackson put it in a dissenting opinion in *Federal Crop Insurance Corp. v. Merrill*, which is gaining authority over the years:

> It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.

332 U.S. at 387-88. It would be anomalous, indeed, if the government were to be held here to a lower standard in dealing with its own employees, with whom it has special ties of loyalty as well as sovereignty, than with outside contractors.

Those principles applied to the undisputed facts of this case establish that the chronological ranking system for support personnel aspiring to positions as Special Agents was a contractual right of those persons entering service before April, 1977. This preference was a valuable—perhaps the most valuable—benefit pertaining to those positions. It was a well-known part of a common-law of FBI employment, understood by the defendants and fostered by their representations to the plaintiffs both as inducements to accept clerical positions and, during plaintiffs' service, by FBI statements of promotion policy. It was understood and recognized at all levels of the FBI command, and by the obvious and visible practice of two decades.

Defendants' denials that a "clerk-to-agent program" existed and that the policy was "mutually understood" do not raise genuine questions of material fact. The de-

nial of the existence of a "program" is simply a semantic formulation that lacks any factual substance. No one disputes what the Bureau's former policy was, or that it was "radically" changed by the implementation of the NSASS.[41] The asserted lack of "mutuality" likewise fails to raise a factual dispute. The fact that defendants knew about, understood, and nurtured the former policy, and accepted the benefits flowing to the Bureau from its existence are not in dispute.[42] Defendants merely assert that

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[41] *See* Affidavit of Clarence M. Kelley, August 13, 1979, at ¶5:

> I was aware when I approved the NSASS that the mechanics of selection would be radically changed and that this change in procedure would effect the manner in which FBI support employees were considered for Special Agent Appointment. However, I was also aware that the FBI Task Force which recommended the adoption of the NSASS to me had specifically considered the FBI's responsibility towards its support employees in this area and that the Task Force had rejected any considerations of preferred treatment of support employees under the NSASS.

[42] In the Affidavit of Joseph Doyle Powell, filed June 14, 1979, as an exhibit to Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment, defendants asserted for the first time (after more than a year of litigation), that the chronological ranking of support employees was not begun until August, 1973, and that the chronological list contained the names of support employees who had met the threshold requirements for consideration, but who were not fully qualified. *See* Powell Affidavit at ¶15. The Powell Affidavit directly contradicts Defendants' Answer to Plaintiffs' Complaint, July 25, 1978, Defendants' Answer to Plaintiffs' Amended Complaint, February 28, 1979, Defendants' Answers to Interrogatories, October 30, 1978, and the Powell Deposition, December 8, 1978. *See* note 5, *supra*. In each, defendants expressly acknowledged that the Bureau had, without modification, maintained a chronological list of clerical employees fully qualified for appointment and made selections for SA in order from this list. This about-face coincided with defendants' apparent understanding, for the first time, that plain-

[footnote continued]

the undisputed facts do not satisfy a legal standard of "mutuality." Where the underlying facts are not in dispute, and the parties contest only the legal conclusions to be drawn from them, summary judgment is appropriate.[43]

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tiffs were asserting a right to a preference for consideration, of which the chronological listing was a key element, not a guarantee of appointment. *See* Memorandum of Points and Authorities, June 14, 1979, at 3 ("Plaintiffs' effort to change horses in midstream must fail").

It is difficult to regard the Powell Affidavit as anything but a last-minute effort by the defendants to raise an issue of material fact precluding summary judgment. The Affidavit was Mr. Powell's third opportunity to present evidence in this case, having earlier verified defendants' answers to interrogatories and testified at deposition. Moreover, the affidavit fails "to set forth specific facts" supporting the defendants' new position, as required by Rule 56(e). In view of all the circumstances, the Court does not treat Mr. Powell's contention as raising a genuine issue of material fact, particularly since it seeks to impeach prior testimony that was the subject of cross-examination. *See* Perma Research and Development Co. v. Singer, 410 F.2d 572, 578 (2d Cir. 1969); *but see* Thyssen Plastik Anger KG. Induplas, Inc., 576 F.2d 400 (1st Cir. 1978). To do otherwise "would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." Perma Research and Development Co. v. Singer, 410 F.2d at 578.

Additionally, careful examination of the Powell Affidavit leads to the conclusion that it does not contradict the substance of plaintiffs' argument. Mr. Powell states that the FBI did not introduce the chronological ranking until 1973 because prior to that time, clerical employees had no difficulty in achieving appointment after qualifying; when an increasing number of qualifying clerical employees and a reduction in the number of SA vacancies prevented the appointment of most applicants, the chronological listing was developed *for modified applicants only*. *See* Powell Affidavit at ¶¶15-17. This approach does not contradict the general outline of the "objective" system of appointment upon which clerical employees justifiably relied.

[43] *See* Spark v. Catholic University of America, 167 U.S. App. D.C. 56, 510 F.2d 1277 (1975); Dewey v. Clark, 86 U.S. App. D.C.

[footnote continued]

The holding here does not imply that every aspect of FBI employment gives rise to vested contractual rights and that defendants are never free to alter the terms of employment without compensation. *See Colm v. Vance*, 567 F.2d at 1130 n. 7. The policy at issue was significant both to the Bureau and to the affected employees; it was well-understood and regularly used, and stood apart in character and significance from other aspects or incidents of FBI employment. It was not a mere condition of employment. The preference was a significant element of compensation for which the Bureau received valuable service beyond what could have been received for the salary paid, but for the preference. The Bureau could no more take away this valuable preference without liability than it could refuse to pay an agreed amount of salary to one of its employees.

Moreover, the Bureau might have limited its liability through explicit statements that the preference accorded clerical employees through the modified program might be altered at any time. Such a statement might at least have avoided the creation of a property interest in employees joining the Bureau after the date on which the disclaimer was adopted. To be effective in defeating ex-

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137, 180 F.2d 766, 772 (1950); Fox v. Johnson & Wimsatt, Inc., 75 U.S. App. D.C. 211, 218-19, 127 F.2d 729, 736-37 (1942) ("Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court.")

It is settled that in the circumstances such as those here, summary judgment may be employed to determine the existence of an implied contract, Bloomgarden v. Coyer, 156 U.S. App. D.C. 109, 479 F.2d 201, 210 (1973), or a constitutional property right arising from an implied promise, *see* Ashton v. Civiletti, Slip Op. at 17-18.

pectations of clerical employees, the statement would have to have been clearly addressed to the preference at issue and to the employees or prospective employees concerned. The notices by defendants after 1972 that clerical employees could not be "guaranteed" advancement to Special Agent are too vague, too broad, and too imprecise to limit the preference here at issue, *see Ashton v. Civiletti, supra*, slip op. at 14-17, particularly in view of the importance, duration, and widespread knowledge of the policy. Indeed, plaintiffs have never claimed a "guarantee" of advancement, only a preference for consideration. The disclaimers, if they can be characterized as such, are best understood as addressing absolute promises of advancement that some recruiters made to clerical applicants in excess of their authority. *See* Findings of Fact No. 15, *supra*. These representations are not the basis of plaintiffs' property right.[44]

C.

Defendants advance two arguments that they claim prevent the Court from finding a protected property interest regardless of the factual circumstances. First, defendants assert that there is no statutory or administrative limitation on the authority of the Bureau to discharge its employees for any reason, citing 28 U.S.C. §536 (exemption from competitive civil service) and 28 C.F.R. §0.137 (hiring authority vested in Director and designated officials). Defendants conclude from these provisions that the FBI is also free to alter the terms of employment, and that any representations made to the plaintiffs "would have been made in direct violation of the legal authority of the Bureau to exercise complete discretion in its authority to hire employees, and would

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[44] *See* note 39, *supra*.

therefore have been void." Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, filed May 3, 1979, at 10.

Since oral argument in this case, the Court of Appeals for this Circuit has addressed precisely the issue raised by the defendants. Concluding that the statutory provision does not prevent an FBI clerical employee from deriving a property interest in his job as the result of Bureau policies and understandings, the Court noted that the statutory provisions:

> do not prevent the Bureau from giving its employees some security in their jobs. We are convinced that the FBI has fostered rules and understandings which, by entitling appellant to believe that he would lose his job only for a job-related reason, gave him a property interest in his position . . . .

Ashton v. Civiletti, Slip Op. at 12. Similarly, the regulation vesting authority to hire in the Director does not limit the Bureau's legal authority to confer substantive rights incident to employment.

Second, defendants rely on the so-called "Testan Rule" that "one is not entitled to the benefit of a position until he has been appointed to it," *United States v. Testan*, 424 U.S. 392 (1976). On this authority they assert that plaintiffs cannot maintain a claim for relief. Defendants' reliance on *Testan* is misplaced. Plaintiffs do not demand the right to appointment as Special Agents, or the pay or privileges of that rank. Rather, they claim a benefit incident to their employment as clerks, namely, a promotional preference. Plaintiffs have been deprived of an employment opportunity promised to them to compensate them for the clerical or support work they undertook. A

claim of this type, like a claim for unpaid salary, clearly falls outside the *Testan* rule. 424 U.S. at 402.

D.

Plaintiffs plainly are entitled to some relief. The circumstances of plaintiff Kizas are illustrative. According to his affidavit, Kizas, then a part-time college student and employed at U.S. Steel, applied to the Bureau in January, 1973, because it appeared to offer the best opportunities available to him for future advancement. Kizas discussed with Special Agents at the Philadelphia office the details of the modified program; only after learning of the advantages that it offered for eventual consideration as a Special Agent did Kizas accept appointment to a clerical position over alternative job opportunities then available to him. In order to accept the position, Kizas and his wife quit their jobs and moved from Philadelphia to Washington, where Kizas began work as a GS-2 clerk. The clerical job with the Bureau paid only 40 percent of his former salary. Kizas met the threshold requirements for consideration as Special Agent in June, 1976, and expected, not unreasonably, to be considered chronologically with other clerks seeking appointment through the modified program. Kizas was still awaiting consideration in April, 1977, when the NSASS was instituted. He states without contradiction that if he had known in 1973 that he would not eventually receive special consideration for appointment as SA by virtue of his clerical service, he would never have accepted employment at a reduced salary and moved to Washington. *See* Kizas Affidavit at ¶¶ 5-19.[45]

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[45] According to the Powell Affidavit, at ¶30, of the 48 named plaintiffs in this action, 32 entered on duty with a college degree. Of these, 20 were assigned to GS-2 positions. Testimony of a

[footnote continued]

Money damages are an appropriate remedy for the damages suffered by plaintiff Kizas, and other similarly situated, in reliance on the continued existence of the preference. The situation here is similar to that in *McAleer v. ATT*, 416 F. Supp. 435 (D.D.C. 1976), in which the Court awarded money damages (but not equitable relief) to a male employee who was the victim of sex discrimination when the defendant, his employer, granted a preference to women for promotion pursuant to the terms of a Consent Decree entered in another action. Judge Gesell refused there to interfere with the Consent Decree, which had the effect of remedying apparent past discrimination. However, he concluded that the burden of the change in promotion policy should not fall to innocent employees. Judge Gesell stated that there was no reason why:

> in equitably distributing the burden among the concerned parties the onus should be shifted from the employer responsible for the discrimination to the blameless third-party employee any more than is, as a practical matter, unavoidable.

416 F. Supp. at 440.

Similar considerations prevail here: first, money damages are an available remedy for an uncompensated taking or breach of an implied contract; second, the nature of the injury suffered by plaintiffs most closely resembles a

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Bureau witness, *see* Dawson Deposition at 7, is clear that "[u]sually, elsewhere in the government, a person with a college degree gets a midlevel type GS rating," which he identified, *id.*, as GS 5-7.

The extent of the loss of income that plaintiffs suffered, and their exact qualifications, go to the amount of damages to be awarded, and not the presence or absence of detrimental reliance by the plaintiffs, which has been convincingly established.

form of detrimental reliance for which money damages is most appropriate; third, the FBI is charged with important law enforcement responsibilities, including the enforcement of the Civil Rights laws. Defendants did not formulate the former policy, and were not responsible for the manifest racial and sexual imbalance among the ranks of Special Agents. They should not be prevented by the Court from bringing about substantial changes that they find necessary and appropriate.[46] Equitable relief, in the form of requiring specific performance of the former system of preferential consideration, is not necessary to afford relief, nor would it otherwise be proper.

The legal remedy by way of money damages is thoroughly appropriate. The public will benefit from whatever improvements the NSASS brings to the FBI and, in fairness, the public should bear the cost of effecting the change. If, as defendants insist, the continued existence of the preference for clerical employees was inconsistent with the implementation of the NSASS, then plaintiffs should be compensated for the termination of this benefit. Both the fifth amendment and elementary principles of fair play require nothing less.

Any attempt at this stage to resolve the amount of damages to be awarded or to design procedural mechan-

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[46] The manifest imbalance in the employment of women and minorities at the FBI is similar to the discrimination judicially noticed by the Supreme Court in United Steelworkers of America v. Weber, 47 U.S.L.W. 4851, 4852 n. 1 (June 27, 1979), and by Judge Gesell in extrapolating from a prior consent decree in McAleer v. ATT, 416 F.Supp. at 439. As in *Weber* and *McAleer*, the Court here makes no finding that the FBI was guilty of discrimination. However, the existence of clear imbalances is noticed by this Court and is a factor in the Court's decision not to order equitable relief.

isms for adjudication of the damage claims of class members would be premature. Indeed, it may well be impossible to compensate plaintiffs precisely; money damages awarded on the basis of "rough justice" are in order. *McAleer v. ATT*, 416 F. Supp. at 440.

In achieving "rough justice" some, all (or none) of the following factors might be considered:

(1) the educational and professional qualifications of individual plaintiffs at the time they were appointed to clerical positions;

(2) the salary the plaintiffs were earning or might have earned had they not accepted employment with the FBI;

(3) the grade at which plaintiffs were employed by the Bureau; and

(4) the length of time plaintiffs served prior to April, 1977.

These factors are not exhaustive, and the parties are invited to suggest others used to measure each plaintiff's damages.

Accordingly, by accompanying Order, the parties are directed to submit memoranda addressing the procedural questions that the Court must face in adjudicating the damage claims. The questions which the parties should consider include:

(1) decertifying the class and permitting the individual plaintiffs to file amended complaints relying on the declaratory judgment entered herein;[47]

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[47] Both parties have treated this suit as essentially a suit against the United States. However, the Court takes no position at this time about whether, or the degree to which, the United States is bound by the Court's finding on the merits. *See generally* Hard & Wechsler, The Federal Courts and The Federal System 1371-77 (2d Ed. 1973).

(2) whether the damage claims of the plaintiffs are aggregable so that exclusive jurisdiction to award damages lies in the Court of Claims; *see* 28 U.S.C. §§1346, 1491; and

(3) whether the damage actions should be heard by this Court or before the Court of Claims. In addition, the parties are invited to offer guidance and suggestions on the appropriate procedures for considering the claims of the class members.

IV

There remains the question of whether the defendants are liable in their individual capacities for money damages. Even though the defendants have infringed upon plaintiffs' constitutional rights, a qualified immunity bars imposition upon them of liability for damages.[48]

Our Court of Appeals has recently addressed the bases for qualified immunity in *Halperin v. Kissinger*, No. 77-2014 (July 12, 1979). The Court noted that the Supreme Court had adopted for federal officials the "objective and subjective standards for qualified immunity" of *Wood v. Strickland*:

> [An official] is not immune . . . [A] if he knew or reasonably should have known that the action he took . . . would violate the constitutional rights of the [person] affected, or [B] if he took action with the malicious intention to cause a deprivation of constitutional rights or other injury . . .

Slip Op. at 33. *Halperin* specifically acknowledges the emphasis placed by the Supreme Court in *Butz v. Econo-*

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[48] Butz v. Economou, 438 U.S. 478 (1978); Procunier v. Navarette, 434 U.S. 555 (1978); Wood v. Strickland, 420 U.S. 308, *rehearing denied*, 421 U.S. 921 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974).

mou on the use of summary procedures to prevent harrassment of officials. *Butz, Procunier*, and *Halperin* all make clear that the defendants are not required to proffer evidence of their reasonableness or good faith until plaintiff has met the burden of alleging and proffering evidence of bad faith.

Based upon the evidence submitted by the plaintiffs, and the uncontroverted affidavits of defendants Webster and Kelley, filed August 13, 1979, at the direction of the Court, the Court concludes that the defendants are entitled to summary judgment on the issue of their individual liability.

The claims raised in this case raise difficult questions of constitutional law. Defendants are not chargeable with error in predicting the course of constitutional law in this field of personnel rights. *Procunier v. Navarette*, 434 U.S. 555 (1978). Under these circumstances, no liability can attach under the so-called "objective" standard of liability.

Neither is there any issue of fact as to the "subjective" basis of liability relating to the good faith of the defendants. Plaintiffs do not explicitly allege that the defendants acted maliciously in depriving plaintiffs of their fifth amendment rights. This failure to allege bad faith is alone grounds to grant summary judgment to defendants. *Halperin v. Kissinger*, Slip Op. at 35 n. 119. More significantly, plaintiffs proffer no evidence which, if proven, would establish malicious intent. At most, the suggestions that defendant Kelley failed to inquire sufficiently into the role the FBI legal counsel played in developing the NSASS would establish negligence on defendant Kelley's part. Such an allegation precludes the possibility of malice. *Procunier v. Navarette*, 434 U.S. at 566; *Halperin v.*

Kissinger, at 35 n. 119. The plaintiffs have proffered no facts that question the good faith of defendant Webster. Accordingly, defendants enjoy official immunity for their acts.

V

In view of the resolution of plaintiffs' claims of an uncompensated taking, it is not necessary for the Court to address the other fifth amendment and Title VII claims. Were the Court to find that the NSASS violated Title VII or the fifth amendment guarantee of equal protection, plaintiffs probably would receive the same relief already proposed here.[49] No purpose would be served, therefore, by considering the questions raised by plaintiffs' claims of discrimination. Courts traditionally avoid considering constitutional questions where alternative grounds of decision are available. These principles of adjudication are particularly applicable here.

/s/ Louis T. Oberdorfer
UNITED STATES DISTRICT JUDGE

Date: February 15, 1980

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[49] As Judge Gesell made clear in his opinion in McAleer v. ATT, 416 F. Supp. at 439, the Court has substantial discretion in determining the type of relief to award even if a finding of discrimination is made. *See also* 42 U.S.C. §2000e-5(g); Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

[Filed FEB 15 1980]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-983

ADOLPH KIZAS, *et al.*,

Plaintiffs,

v.

WILLIAM H. WEBSTER, *et al.*,

Defendants

ORDER AND JUDGMENT

Upon consideration of the parties' motions for summary judgment, the oppositions thereto, and the entire record in this case, and for the reasons set forth in the accompanying Memorandum, it is, this 15th day of February, 1980, hereby

ORDERED, ADJUDGED AND DECREED: That the Modified Program of the FBI for clerical employees seeking advancement to the position of Special Agent, as it existed prior to April, 1977, was a valuable property right held by members of plaintiffs' class. This property right, the principal elements of which were the objective system of testing and the chronological ranking of support employees fully qualified for appointment, was taken by defendants without just compensation, in violation of the fifth amendment to the Constitution, when the defendants implemented the NSASS; and it is

FURTHER ORDERED: That as to the existence of a protected property interest, plaintiffs' motion for sum-

mary judgment on Count I of their Amended Complaint is GRANTED; and defendants' motion for summary judgment on Count I is DENIED; and it is

FURTHER ORDERED: That as to defendants' individual liability, defendants' motion for summary judgment is GRANTED; plaintiffs' motion for summary judgment is DENIED; and it is ADJUDGED that defendants are immune from personal liability for damages; and it is

FURTHER ORDERED: That the motions of both parties for summary judgment on Count II of the Amended Complaint are DENIED; and Count II is DISMISSED as unnecessary for the Court to resolve in order to grant plaintiffs all the relief to which they are entitled; and it is

FURTHER ORDERED: That at a status conference scheduled for February 29, 1980, at 2:00 p.m., the parties should be prepared to address the issues identified in the Memorandum regarding the proper forum in which to adjudicate damage claims, the mechanism by which such claims should be considered, and the appropriate measure of damages.

/s/ Louis T. Oberdorfer
UNITED STATES DISTRICT JUDGE

APPENDIX C

[Filed APR 25 1980]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-983

ADOLPH KIZAS, *et al.*,

Plaintiff,

v.

WILLIAM H. WEBSTER, *et al.*,

Defendants.

MEMORANDUM

I.

This case is before the Court on several motions filed by both parties following the Court's Memorandum and Order of February 15, 1980. Plaintiffs have moved (a) pursuant to Rule 59(e), Fed. R. Civ. P., to amend the judgment to retain jurisdiction over the Title VII claims asserted in Count II of the amended complaint; and (b) pursuant to Rule 15(b) and (c), Fed. R. Civ. P., to amend the complaint by adding the United States as a defendant and alleging jurisdiction under the Tucker Act, 28 U.S.C. §1346(a) (2) (1976). Defendants oppose any exercise of jurisdiction over Count II, and have renewed their motion to dismiss the Title VII claims for lack of exhaustion of administrative remedies. In addition, defendants have moved to dismiss the remaining elements of Count I or to transfer the money claims to the Court of Claims.

Having carefully reviewed the arguments of both sides, the Court has determined (1) that the dismissal of Count II should not be disturbed; (2) that plaintiffs should be permitted to add the United States as a party defendant; and (3) that exclusive jurisdiction over the damage claims of those class members alleging damages in excess of $10,000 lies in the Court of Claims. By accompanying Order, the Court will offer plaintiffs the opportunity to choose between transferring the damage claims of all class members to the Court of Claims pursuant to 28 U.S.C. §1406 or bifurcating the class into two groups: those with damage claims not in excess of $10,000 and those with claims in excess of $10,000. This Court would retain jurisdiction over the claims of the former class pursuant to 28 U.S.C. §1346(a) (2).

II. Count II

By Memorandum and Order of February 15, 1980, the Court dismissed Count II of the amended complaint, which charged that the minority and female qualifying programs of the New Special Agent Selection System ("NSASS") discriminated against plaintiffs in violation of Title VII and the fifth amendment. The Court determined that the plaintiffs could obtain complete relief from adjudication of Count I and dismissed Count II rather than reach the difficult factual and constitutional issues it raised.

By their motion to alter or amend the judgment, plaintiffs seek reconsideration of this action. Plaintiffs maintain that relief under Count II would not be co-extensive with that contemplated by Count I for violation of an implied contract. In particular, plaintiffs note that the NSASS followed the abrogation of their contractual preference that was the subject of Count I, and thus covered

a different time period, and that Title VII permits the award of attorney's fees, which might not be available for Count I.

Assuming arguendo that the relief for the two counts is not substantially the same, Count II must nevertheless be dismissed on the grounds that plaintiffs failed to exhaust their administrative remedies. It is clear initially that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16 (1976), constitutes the exclusive remedy for claims of employment discrimination by federal employees subject to its protection. *Davis v. Passman*, 442 U.S. 228 (1979); *Brown v. GSA*, 425 U.S. 820 (1976). It is equally clear that claims under Title VII may not be brought in federal court where the plaintiffs have failed properly to raise their contentions at the administrative level. *Brown v. GSA*, 425 U.S. at 832; *Hackley v. Roudebush*, 171 U.S. App. D.C. 376, 520 F.2d 108 (1975).

Plaintiffs claim that on several occasions they complained informally about the effects of the NSASS and that defendants have refused to provide any relief. Plaintiffs do not seriously suggest that such complaints are an acceptable substitute for the formal procedures provided in Title VII. Nor can plaintiff maintain that such inquiries demonstrate the "futility" of administrative recourse so as to justify their failure to exhaust. The law in our circuit is clear that the mere assertion that the administrative recourse is futile will not relieve a plaintiff of the duty to exhaust, particularly where the defendant is a federal agency and there exist formal avenues for administrative redress. *League of United Latin American Citizens v. Hampton*, 163 U.S. App. D.C. 283, 501 F.2d 843 (1974).

Plaintiffs suggest that this Court exercise ancillary jurisdiction over the Title VII claims. Such an exercise of jurisdiction would be inappropriate, even if feasible. Adjudication of Count II would involve substantial fact-finding and would require the commitment of substantial resources by the Court and the parties. Moreover, as plaintiffs now maintain, the facts surrounding Count II arise later than and are not integrally related to those in Count I, which has already been adjudicated. Finally, in view of the Court's disposition of Count I, adjudication of Count II is not necessary to protect the integrity of the main proceeding. Under these circumstances, the exercise of ancillary jurisdiction would be improper. *See Morrow v. District of Columbia*, 135 U.S. App. D.C. 160, 417 F.2d 728, 740 (1969).

In view of the foregoing, the Court need not address and does not decide the question it raised in oral argument that the issues in Count II have not been raised in sufficient adversarial context to permit a decision.

III. Count I: Jurisdiction

A.

With the entry of the declaratory judgment and the denial of injunctive relief on February 15, 1980, this action became one essentially for money damages against the United States. Accordingly, it is necessary to address the issues posed by the overlap of jurisdiction between this Court and the Court of Claims under the Tucker Act, 28 U.S.C. §1346(a) (2) and 1491, which both parties agree is the sole independent basis for jurisdiction over the remaining claims.

The Tucker Act provides for concurrent jurisdiction in the District Court and the Court of Claims for actions in

which the amount claimed is not in excess of $10,000.[1] Where the claim exceeds $10,000, exclusive jurisdiction lies in the Court of Claims.[2]

Plaintiffs have sought leave to file a Second Amended Complaint alleging jurisdiction pursuant to section 1346, but not specifying any amount claimed. They assert that it is now impossible to evaluate each plaintiff's claim because the Court has yet to determine the manner of valuation. However, plaintiffs represent that at least some members of the class have suffered damages of less than $10,000. *See* Plaintiff's Reply to Defendants' Supplemental Memorandum of Points and Authorities in Support of Motion to Dismiss or, in the Alternative, for Transfer to the Court of Claims, April 17, 1980, at 3-4. Plaintiffs suggest, *see id.* at 4-5, that this Court retain jurisdiction of all claims under any one of three theories: first, that because there exist some class members for whom there is jurisdiction in this Court, the Court may retain jurisdiction over the entire class; second, that be-

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[1] 28 U.S.C. §1346(a) provides in pertinent part:

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation in an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

[2] 28 U.S.C. §1491 provides:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

cause jurisdiction over all the claims of the class was initially proper under 28 U.S.C. §1331 without regard to the amount claimed, all the damage claims under the Tucker Act may be adjudicated as pendent or ancillary to the original claim. Finally, plaintiffs urge that they not be required to allege an amount claimed until all matters relating to valuation have been adjudicated. Then, only those claims valued in excess of $10,000 would be transferred to the Court of Claims for entry of judgment.

Defendants argue that since damage claims may be substantial, plaintiffs should be required either to waive all claims for damages in excess of $10,000, *see Vander-Molen v. Stetson*, 187 U.S. App. D.C. 183, 571 F.2d 617, 619 n. 1 (1977), or transfer this action to the Court of Claims pursuant to 28 U.S.C. §1406. Defendants rely on a number of cases involving military officers in which claims for mandamus or declaratory relief were joined with claims for back pay. In each, the courts held that since the claims were essentially actions for money against the United States (and the amount sought exceeded $10,000), jurisdiction lay in the Court of Claims. *See Denton v. Schlesinger*, 605 F.2d 484 (9th Cir. 1979); *Cook v. Arentzen*, 582 F.2d 870 (4th Cir. 1978); *Polos v. United States*, 556 F.2d 903 (8th Cir. 1977); *Carter v. Seamans*, 411 F.2d 767 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970).

Upon reflection, the Court has determined that if plaintiffs desire to continue this action in District Court, the proper course is to bifurcate the class to retain only those claims of class members seeking damages not in excess of $10,000. The various alternatives proposed by plaintiffs to retain jurisdiction over all the claims would do violence to the careful division of jurisdiction mandated by Congress and would frustrate the intent of Congress that

the expertise of the Court of Claims be employed in all cases in which the damages sought against the United States exceed $10,000.

Plaintiffs can offer no authority to support either of their theories of ancillary jurisdiction. Jurisdiction over the claims of class members depends upon the amount claimed individually by class members. *March v. United States*, 165 U.S. App. D.C. 267, 506 F.2d 1036, 1309 n. 1 (1974); *Fox v. City of Chicago*, 401 F. Supp. 515 (N.D. Ill. 1975). It is well-established that in class actions, the Court must have jurisdiction over each plaintiff; claims of class members over whom the court lacks jurisdiction cannot be adjudicated as ancillary or pendent to the claims of those class members for whom jurisdiction lies. *Zahn v. International Paper Co.*, 414 U.S. 291 (1974); C. Wright, Law of Federal Courts 355-56 (1976); *see also March v. United States*, 506 F.2d at 1309 n. 1; *Fox v. City of Chicago*, 401 F. Supp. at 518.

Plaintiff's reliance on *Commonwealth of Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11, 25 (3rd Cir. 1975) is misplaced. There, the Court of Appeals merely noted that the District Court erred in aggregating the claims of class members in determining jurisdiction under the Tucker Act. The Court additionally noted that dismissal of all claims was proper since no individual class members' claim met the jurisdictional limits of section 1346(a) (2). Nowhere does the Court suggest that the District Court might have retained jurisdiction over the entire class if there were jurisdiction over some individual claims. *See* 520 F.2d at 25.

Neither would it be proper for the Court to retain jurisdiction over all the damage claims as pendent to the original constitutional claim under 28 U.S.C. §1331. Plaintiff offers no authority for the proposition that damage

claims against the United States can be adjudicated as ancillary to claims for which there is federal question or mandamus jurisdiction. Indeed, the Courts that have considered this argument have rejected it. *Denton v. Schlesinger*, 605 F.2d at 486 n. 4; *Glines v. Wade*, 586 F.2d 675, 681-82 (9th Cir. 1978), *rev'd on other grounds sub nom. Brown v. Glines*, 48 U.S.L.W. 4095 (January 22, 1980).

Plaintiffs nevertheless raise a difficult question. Where a claim for declaratory or injunctive relief raising a clear federal question is coupled with or may result in a claim against the United States for money damages, there is a potential for conflict between the Court of Claims, which has exclusive jurisdiction over money claims in excess of $10,000, and the District Court, whose jurisdiction under sections 1331, 1361 and 2201 of Title 28 is exclusive. Defendants would have the District Court defer in all cases, and imply that this Court was without authority to issue a declaratory judgment with binding collateral effect. Plaintiffs would have the District Court retain jurisdiction up to the point at which a money judgment literally must be entered, only then transferring claims in excess of $10,000 to the Court of Claims for entry of final judgment. The authorities cited for both parties are not particularly helpful. Defendants draw the Court's attention to a number of cases involving the military in which claims for declaratory relief were coupled with claims for back pay in excess of $10,000. In each case, the Court of Appeals found that the money claims were the essence or keystone of the plaintiffs' claims; they held that for the District Court to adjudicate the declaratory aspects of the case would usurp the jurisdiction of the Court of Claims by deciding the principal legal issue in the case. In each, the Courts of Appeals approved or ordered the District Court to defer to the Court of Claims.

See e.g., Denton v. Schlesinger, 605 F.2d at 486-88; *Cook v. Arentzen*, 582 F.2d at 878; *Carter v. Seamans*, 411 F.2d at 776 (District Court opinion incorporated by reference); *see also Larsen v. Hoffman*, 444 F. Supp. 245 (D.D.C. 1977).

These cases offer little guidance here, however, for two reasons: first, in those cases it was clear at the outset that money was the essence of the plaintiff's suit. By contrast, the plaintiffs here raised difficult and novel constitutional questions that they hoped to resolve by a declaratory judgment in a court with jurisdiction pursuant to 28 U.S.C. §§1331 and 2201 and thereby become entitled to injunctive relief. The possibility of money damages became central at a late stage of the proceedings only after the Court declined to award injunctive relief and after the principal legal issue had been adjudicated. Second, in the military cases cited by defendant, the Court of Claims had been awarded special statutory authority to award equitable relief, so that by sending the plaintiffs to the Court of Claims, the Courts of Appeal were not forcing them to litigate in two forums. *See, e.g., Cook v. Arentzen*, 582 F.2d at 877; *Carter v. Seamans*, 411 F.2d at 773-74.

Plaintiffs rely exclusively on *Melvin v. Laird*, 365 F. Supp. 511 (E.D.N.Y. 1973). There, the District Court refused to dismiss an action for declaratory relief but not for damages simply because the ultimate effect of a declaration of rights might be a damage claim in excess of $10,000. The Court concluded that where substantial rights were involved in addition to a potential money claim, the jurisdiction of the District Court under 28 U.S.C. §§1331 or 1361 was not eliminated by a potential and speculative monetary recovery in the Court of

Claims under the Tucker Act. 365 F. Supp. at 519; *see also Glines v. Wade*, 586 F.2d at 681.

In *Melvin*, the District Court was faced with a decision at the outset of the suit whether to defer to the Court of Claims. It was not faced, as the Court is here, with the problem of how to proceed after the legal issues had been resolved and only a damage claim remained. Indeed, in *Melvin* the District Court specifically reserved the question of how its jurisdiction might be affected if the plaintiff ultimately sought money damages. 365 F. Supp. at 520.

The problem faced by the District Court in *Melvin* is far more like that addressed by this Court at the outset of this action. The Court agrees that like the plaintiffs in *Melvin*, the potential of a monetary recovery did not deprive the court of jurisdiction to consider whether the plaintiffs were entitled to declaratory or injunctive relief pursuant to sections 1331, 1361 or 2201 of Title 28. Having resolved that issue, however, the Court cannot escape the conclusion that whatever else this action might have been, it is *now* in essence an action for money damages. If the claims exceed $10,000, jurisdiction lies exclusively in the Court of Claims. 28 U.S.C. §1491. *See Larsen v. Hoffman*, 444 F. Supp. at 255. As the Court of Appeals notes in *Glines v. Wade*, "[t]he government, of course, could not relitigate in that forum any issues which have been decided against it here." 586 F.2d at 682.

This result, which will occasion either the transfer of all claims to the Court of Claims or a bifurcation of the class and a transfer of some claims, will result in some hardship to the plaintiffs. Nevertheless, it is consistent with the statutory division of responsibility between the

District Court and the Court of Claims. The cases are clear that the extension of jurisdiction to the District Court to adjudicate money claims of $10,000 or less was not intended to restrict the exclusive jurisdiction of the Court of Claims for amounts over $10,000. *Melvin v. Laird*, 365 F. Supp. at 517; *Carter v. Seamans*, 411 F.2d at 771-72. Respect for this principle requires deference to the Court of Claims for actions essentially for money in excess of $10,000 even where jurisdiction over part of the action may lie under another provision. *See Carter v. Seamans*, 411 F.2d at 775. The division of responsibility between the District Court and the Court of Claims has traditionally entailed separate suits for equitable relief and money damages, *see Melvin v. Laird*, 365 F. Supp. at 516-18; this division, and its consequent imposition on plaintiffs, has only partially been alleviated by amendment to the Tucker Act. It reflects the fundamental Congressional purpose to employ the expertise of the Court of Claims in all cases in which the damages sought against the United States exceed $10,000. *See Glidden v. Zdanok*, 370 U.S. 530 (1962).

Plaintiffs' suggestion that they not allege any jurisdictional amount until after the Court has valued all the claims would frustrate the Congressional purpose of limiting the jurisdiction of the District Court. The court has faced a similar suggestion in *Larsen v. Hoffman, supra*, in which plaintiffs sought to deduct potential setoffs and counterclaims from the amount they were claiming in order to remain within the jurisdictional limits of the District Court. In a careful and substantial opinion, Judge Corcoran held that the traditional rules for pleading of jurisdictional amounts in controversy applied to actions under the Tucker Act. 444 F. Supp. at 254. *Larsen* is controlling here. Like the situation faced by Judge Cor-

coran, the plaintiffs' proposal here would require jurisdictional determinations to await the outcome of the trial on the merits. This result is plainly not contemplated by the statute, which refers to the amounts of "claims" against the United States. 28 U.S.C. §1346(a) (2).

In order to permit the plaintiffs the widest latitude in deciding how to proceed, the Court will delay entry of any final order transferring any claims for a period of 60 days. During this time, plaintiffs may elect either to have the entire action transferred to the Court of Claims pursuant to 28 U.S.C. §1406, or to bifurcate the class, with this Court retaining jurisdiction over only those claims not greater than $10,000. Plaintiffs may, of course, elect to pursue the entire action in this Court by waiving all claims in excess of $10,000. *See VanderMolen v. Stetson*, 571 F.2d at 619 n. 2. If the plaintiffs elect to pursue all or some of their claims in this Court under the foregoing conditions, the Court will grant leave for plaintiffs to file a Second Amended Complaint alleging jurisdiction under the Tucker Act and pleading an amount claimed. *See* Rule 8(a), Fed. R. Civ. P. Without objection from the government, which has acknowledged that this is an action essentially against the United States, *see Dugan v. Rank*, 372 U.S. 609 (1963), the Court will also grant leave to add the United States as a party defendant.

An appropriate order accompanies this Memorandum.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

Date: April 25, 1980

[Filed APR 25 1980]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-983

ADOLPH KIZAS, *et al.*,

Plaintiff,

v.

WILLIAM H. WEBSTER, *et al.*,

Defendants.

ORDER

The Court has considered plaintiffs' motions to alter or amend the judgment and to amend the complaint, and defendants' opposition thereto; and defendants' motion to dismiss or, in the alternative, for transfer to the Court of Claims, and plaintiffs' opposition thereto. For the reasons set forth in the accompanying memorandum, it is this 25th day of April, 1980, hereby

ORDERED: That plaintiffs' motion to alter or amend the judgment is DENIED; and it is

FURTHER ORDERED: That the plaintiffs shall have 60 days from the date of this Order in which to elect against the United States not in excess of $10,000 or to transfer all claims to the Court of Claims; and it is

FURTHER ORDERED: That plaintiffs shall file no later than 60 days from the date of this Order a notice setting forth the manner in which they elect to proceed; and it is

FURTHER ORDERED: That if plaintiffs elect to proceed in this Court leave is GRANTED to amend the Amended Complaint to add the United States as a defendant and to allege jurisdiction pursuant to 28 U.S.C. §1346(a) (2), provided that plaintiffs also allege an amount claimed by each individual from the United States. Nothing in this Order shall be construed as limiting the jurisdiction of this Court to effectuate the Declaratory Judgment entered February 15, 1980, or otherwise to protect its jurisdiction; and it is

FURTHER ORDERED: That defendants' motion to dismiss or, in the alternative, to transfer to the Court of Claims is DENIED without prejudice.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

APPENDIX D

[Filed FEB 18 1982]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-983

ADOLPH KIZAS, *et al.*,

Plaintiff,

v.

WILLIAM H. WEBSTER, *et al.*,

Defendants.

MEMORANDUM

This case is currently before the Court on plaintiffs' Motion for Summary Judgment on damages. The Court previously granted the plaintiff's Motion for Summary Judgment on liability, holding that defendants' termination of a program whereby clerical employees of the Federal Bureau of Investigation received preferential consideration for jobs as special agents with the FBI was a taking of private property without just compensation, in violation of the Fifth Amendment. That memorandum requested further submissions on the measure of damages, noting that "it may well be impossible to compensate plaintiffs precisely; money damages awarded on the basis of 'rough justice' are in order." *Kizas v. Webster*, 492 F. Supp. 1135, 1150 (D.D.C. 1980). The plaintiffs' motion is supported by voluminous affidavits from individual plaintiffs and from several economic experts. At

oral argument defendant conceded the accuracy of the amounts but disputed the recoverability of all of the elements of damages plaintiffs have claimed on legal grounds. Consequently, a determination by this Court of the elements of damages that are legally recoverable should be dispositive of the issue of damages in this case.

While plaintiffs present two theories of damages in their moving papers, the theory which they urge most strongly is denominated "Theory B." Essentially, this theory seeks to place plaintiffs in as good a position as they would have occupied had the wrongfully terminated clerk-to-agent program never existed. This is contrasted with "Theory A," which would attempt to compensate plaintiffs for termination of the program by placing them in as good a position as they would have occupied had the clerk-to-agent program not been terminated. As such, the distinction corresponds rather closely with the distinction in contract law between reliance damages (Theory B) and expectancy damages (Theory A). *See generally* Fuller & Perdue, *The Reliance Interest in Contract Damages*, (Parts I & II), 46 Yale L.J. 52, 373 (1963-37); J. Calamari & J. Perillo, Contracts §14-9 (2d ed. 1977).

By analogy to contract law, plaintiffs argue that here the benefit of the bargain, which is the preferential path to special agent status, is too difficult to value, and plaintiffs' damages should accordingly be measured by what the plaintiffs gave up in reliance on the existence of the preference. This is particularly true, plaintiffs claim, where the reliance theory will fully compensate plaintiffs at a lesser cost to defendants than would an expectancy theory. *See Big Rock Mountain Corp. v. Stearns-Roger Corp.*, 388 F.2d 165, 170 (8th Cir. 1968). It is clear from the record that the value of the preference is difficult to quantify, since among other things the percentage

of clerks who actually became special agents under the program is unknown. The defendant does not really dispute the appropriateness of this theory itself. Accordingly, the Court concludes that in the context of this case, where the value of the expectancy is admittedly speculative, the reliance measure of damages is the appropriate measure of damages. *See* Restatement (Second) of Contracts §363 (Tentative Draft No. 14, 1979); Restatement of Contracts §333 (1932); *Dialist Co. v. Pulford*, 42 Md. App. 173, 399 A.2d 1374 (1979); *In re Yeager Co.*, 227 F. Supp. 92 (N.D. Ohio 1963); *see also United States v. Behan*, 110 U.S. 338 (1884).

The chief argument which defendants make is that, had the contract been fully performed, the value of the performance would have been zero, and that reliance damages must not exceed the value of the contract had it been fully performed. *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182 (2d Cir. 1949). In support of this defendants cite a number of cases involving employment contracts, in which courts have held that where employment is terminable at will there is no breach of contract, and therefore no damages. This issue has, however, already been resolved against the defendants. *Kizas v. Webster, supra; see also Ashton v. Civiletti*, 613 F.2d 923 (D.C. Cir. 1979). Thus, it is irrelevant that, for example, a teacher with a one-year contract who is wrongfully terminated is entitled to only salary for the remainder of that year. *Wyatt v. School District No. 104*, 148 Mont. 83, 417 P.2d 221 (1966). In such a case, the only wrong suffered is the loss of pay for the remainder of the year. This is not a case in which a wrongful dismissal from a job as a special agent is alleged. Rather, the wrong of which plaintiffs complain is the termination of the opportunity for preferential consideration for the position of

special agent, an opportunity which had value even though it was not guaranteed that any particular plaintiff would become a special agent or that he would not be fired if he did become one. Each plaintiff had some chance of becoming such an agent and some chance of remaining in that position. For that chance plaintiffs incurred losses, and these losses are legally compensable where, as here, plaintiffs have been deprived of that opportunity by defendants. *Dialist Co. v. Pulford, supra.*

It is of course true, as defendants argue, that if plaintiff has entered into a losing bargain he is not entitled to better his position at the expense of defendant. *L. Albert & Son v. Armstrong Rubber Co., supra.* However, the burden of proof is upon defendant on this issue, and defendant has offered no evidence that plaintiffs here entered into a losing contract. Rather, for most of the plaintiffs the contract is likely to have been a very beneficial one had it been performed. The defendants' contention that the value of becoming a special agent should be set at zero because special agents can be fired at will overlooks the fact that most special agents are not so fired; the average agent maintains that position 26.77 years. Here, therefore, where there is no showing or attempt to show that plaintiffs would have in fact suffered a loss had the contract been fully performed, plaintiffs are entitled to recover at least the loss they suffered in reliance on the clerk-to-agent program. "It does not lie . . . in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced . . . to lay out and expend." *United States v. Behan, supra,* at 345; *see also L. Albert & Son v. Armstrong Rubber Co., supra,* at 189-90; *Dialist Co. v. Pulford, supra,* 399 A.2d at 1381; *In re Yeager Co., supra;*

Holt v. United Security Life Ins. & Trust Co., 76 N.J.L. 585, 597, 72 A. 301, 306 (1909). Restatement (Second) of Contracts, *supra*, §363, comment a.

The Court thus concludes that plaintiffs are entitled to recover their reliance losses and reliance expenditures. There remains the necessity of deciding what these losses and expenditures include. The plaintiffs claim as the loss element the difference between what a plaintiff would have earned if he or she had not relied upon the opportunity offered by the FBI and what a plaintiff did earn as a FBI clerk. Plaintiffs use as the amount which a plaintiff would have earned the average earnings of a person of the plaintiff's age, education, sex and race as determined by the Bureau of the Census. There is no dispute over the accuracy of the census figures proffered by plaintiffs or over the appropriateness of use of this data in estimating what each plaintiff would have earned absent the clerk-to-agent program. *See Higgins v. Kennebrew Motors, Inc.*, 547 F.2d 1223 (5th Cir. 1977). Plaintiffs then claim as each plaintiff's loss the amount determined by subtracting from the census-derived figure the amount actually earned by that plaintiff during the relevant time period. The loss calculation method proposed by plaintiffs is unexceptional and is approved for purposes of this case.

Plaintiffs claim that the relevant time period runs from when each plaintiff began work at the FBI until that plaintiff left or should have left that employment. The date on which plaintiffs assert that a duty to mitigate damages arose is April 4, 1978, the date on which plaintiffs were notified that they could seek alternative employment and still receive credit for their clerical experience in applying for future special agent vacancies. This date is almost one year after the termination of the

clerk-to-agent program was announced. As such, it represents a reasonable compromise date, since it would be clearly unreasonable to expect plaintiffs to obtain alternative employment immediately after termination of the clerk-to-agent program. Defendants have not disputed the validity of this date, and the Court thus adopts it as a reasonable date after which any reduced pay suffered by remaining at the FBI will be deemed to be a result of the plaintiff's own choice to remain there. Thus, plaintiffs are entitled to basic damages in the amount of the difference between the amount they earned at the FBI between (a) the time they began and (b) the earlier of their actual departure dates or April 4, 1978 and the average amounts, that persons of their age, sex, race and education earned.

Plaintiffs also claim the right to compensation for their reduced earning capacity beyond this date as a result of their having worked at the FBI during the relevant time period. This argument must be rejected. These damages are too speculative to be awarded. Some plaintiffs may have actually been benefited by their FBI employment; others may have been harmed. The degree of this harm and the rate at which it will diminish in the future is extremely uncertain. As stated previously, it is impossible to calculate these damages with too much precision; a "rough justice" is all that can be expected. This is best achieved by giving the plaintiffs the aforementioned period of slightly less than one year in which to obtain other employment, and to terminate the period of damages after that date.

To this figure there should be added those expenses incurred by plaintiffs in traveling to their place of employment with the FBI. Defendant claims that these expenses are not recoverable because they are made in preparation for performance but such preparatory expenses are of

course recoverable under the reliance approach, since they are clearly foreseeable costs of entering into the contract. *See* Restatement (Second) of Contracts, *supra*, §363. However, costs of moving to new jobs obtained by plaintiffs after leaving the FBI are not so recoverable, since they would have in all probability been incurred even had there been no clerk-to-agent program. For example, if a plaintiff moved from Pittsburgh to Washington to join the clerk-to-agent program his expenses of so moving are a consequence of reliance on the program and properly recoverable. However, if the same plaintiff moved to New York after leaving the FBI the expenses of such a move would not be recoverable, since plaintiff would have had to move to New York to obtain that job even had the program never existed.

Plaintiffs also claim a right to recover for amounts spent on educational expenses incurred as a result of the program. However, it is completely speculative whether or not individual plaintiffs would have chosen to obtain a college degree, for example, had the clerk-to-agent program not existed. In addition, the plaintiffs who incurred educational expenses of course obtained the offsetting benefit of the value of the education received. The amount of any difference between what plaintiffs paid for these benefits and what they were worth to plaintiffs is speculative; such expenses may not be recovered here.

Finally, five plaintiffs claim that their spouses suffered unemployment or reduced wages as a result of their decision to join the clerk-to-agent program. Again, such damages are not recoverable here. It is impossible to tell which plaintiffs' spouses would have been unemployed had they taken employment with someone other than the FBI. In addition, there is no evidence that the defendants could have anticipated that such consequences were

likely to flow from the program, and any damages from spousal unemployment would thus appear to be barred by the rule requiring that damages from a breach of contract be reasonably forseeable. *See Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854); J. Calamari & J. Perillo, *supra*, §§14-5 - 14-7.

Finally, defendant claims that a reduction in the damages awarded should be made to reflect the possibility that some of the plaintiffs might have been unemployed had the clerk-to-agent program not existed. However, this factor is more than compensated for by the fact that the Department of Commerce Current Population Reports, from which the plaintiffs have calculated their amounts for average wages of workers in the plaintiffs' respective age, education, race and sex groups tend to understate income by approximately ten percent. *See* Supplemental Affidavit of Paul Garfield, Ph.D. Defendants have not contested this fact. This discount effect more than compensates for the possibility that some of the plaintiffs may have been unemployed in the absence of the program. Even if this were not true, the other items of plaintiffs' damages which have been disallowed here as speculative would more than adequately compensate for this speculative possibility.

The Court thus concludes that plaintiffs are entitled to recover the amounts claimed under Phase I of their Theory B for lost wages, as well as any expenses of moving *to* their jobs at the FBI, less any tax savings enjoyed with respect to moving expenses.

Plaintiffs' remaining elements of damages are disallowed. The parties have represented that the amounts are not in dispute.

Accordingly, plaintiffs shall, on or before February 22, 1982, submit a form of judgment with the relevant amounts to which each plaintiff is entitled, which order shall have been seen by defendants. Defendants may on or before February 26, 1982, file an objection to these amounts. Upon receipt of these papers, the Court will enter the appropriate summary judgment order.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

February 17, 1982

APPENDIX E

[Filed AUG 5 1983]

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

September Term, 1982

No. 82-1477

Adolph Kizas, et al.,
Appellees,

v.

William H. Webster, et al.,
Appellants.

And Consolidated Case No. 82-1511

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges; and Bazelon, Senior Circuit Judge

ORDER

On consideration of the motion of Adolph Kizas, et al. for leave to file a suggestion for rehearing *en banc* in excess of the page limitation, it is

ORDERED by the Court *en banc* that the aforesaid motion is denied.

FOR THE COURT:

George A Fisher
Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Tamm and Bork did not participate in this Order.

APPENDIX F

Kenneth R. Ackman
Richard L. Adams
Steven E. Ahrens
Daniel J. Albano
Robert J. Alford
Edward J. Allar
Shelley Alvarez
Rickey Ambrose
Marsha Ammons
David M. Anctil
George L. Anderson, III
Joe W. Anderson
Warren E. Anton
John N. Arace
Glen W. Armfield, Jr.
Richard Arnold
David L. Askew
Michael Augustyn
J. Lyman Babcock, Jr.
Larry H. Bailey
Larry L. Bailey
Robert Baldwin
Douglas B. Bales
Wayne S. Barfield
Charles S. Barr
Charles F. Barrett
Randy M. Barry
Timothy B. Baston
James M. Batchelder
Theodore D. Bates
Terry R. Beamer
Raymond Beaudreault
Lawrence S. Beaumont
Richard D. Beck, Jr.
Charles V. Becker
Donald M. Becker, Jr.
Andrew P. Bell
Anthony F. Belovich
Gerald Benn
Lt. John G. Bermingham
Michael W. Bernacki
Timothy Bezick
Thomas Bisceglia
Thomas E. Bock
Bruce Bogstad
William H. Bolch, III
Patrick R. Bolger
John F. Bonney
Peter John Boresky
Robert J. Boudreau
Robert Bourgeois, Jr.
Steven A. Boyd
Bob H. Boyles
Charles Brady
Paul Brady
Stanley R. Brandenburg
H. Lee Brawley
Ronald S. Brechon
James C. Brennan
Peter M. Brennan
William J. Brennan
Scott M. Briggs
John D. Brocco
Phillip T. Brookman
Richard P. Brooks
Douglas E. Brown
John R. Brown
Kenneth A. Brown
William D. Brown
David E. Bruner
Edward Brzezowski
Louis Bullard
Daniel C. Burch
Thomas R. Burchfield
Michael Burke
Jerry D. Burks
Stephen H. Burnett
Edward C. Burns
Ronald R. Burns
Wayne G. Burnside
Timothy L. Bushay
Robert Buszko
H. Michael Butler
Gerald F. Cabot, Jr.
Thomas W. Cain
William F. Callahan

Paul D. Caltabiano
Robert Camp
Francis L. Cancellieri
Anthony B. Cannizzo
Jeffrey R. Cappel
Peter A. Carbone
Peter L. Carpanini
Kenneth L. Carpenter
Elliott T. Carr
Timothy Carr
Richard J. Carrig
James H. Carter
William D. Carter
Nicolas Caruso
Thomas Carvour
Gary Casabona
Thomas L. Casburn
Kevin J. Casey
Dennis Castleberry
Thomas K. Cavanagh
Peter Cerrato
Ray Chaiellini
Thomas R. Chancey
Mark Chersevani
Mark Chidichimo
Roger A. Christ
Frank J. Christian, II
Wallace M. Ciepiela
Paul Cignoli
Lt. R. Dennis Clark
Michael L. Clark
Kevin Clougher
Thomas A. Coccia
Patrick J. Codd
John Cohee
Terry L. Cohen
Nicholas Colicino
Matthew G. Colleran
Darrell L. Combs
Louis M. Condatore
Mary Ellen Conlin
Brian Conlon
Thomas J. Connor
Ernest S. Constantino
Horace C. Conti
Russ M. Conway
Christopher J. Cook
Lt. W. T. Cook
Larry P. Cork
Michael J. Costello
Joseph J. Coury
Ronald G. Cox
Charles T. Coyle, III
Thomas G. Crandall
Edward M. Crawford
Douglas A. Crigger
John D. Crimmins
Kevin E. Cronin
G.A. Crosby
Dewey E. Crowe, II
Jacob Culclasure, III
Denton E. Cundiff
Francis X. Curley
Robert T. Curran
William H. Curtis
Michael J. D'Eugenio
Kevin Dalton
William J. Daly
Lawrence J. Danielson
Bruce S. Davidson
Gary D. Davis
Todd C. Dawson
Philip E. Dayvault
Ronald De Angelo
Gregory D. De Boer
Anthony De Gregorio
James W. Deadwiley
Joseph R. Dedics
Brian Deery
Larry D. Depew
Joel L. Deutsch
John P. Devine, Jr.
William H. Dewan
Frederick R. Dexter
William J. DeZonia, Jr.
Dennis Dickerson
Robert J. Dillard
Joseph G. Dillon
Richard Dixon
James L. Domres
Michael R. Donelson
Thomas G. Donlon

Kevin F. Donohue
Paul J. Dougherty, Jr.
Steven W. Downey
Edward J. Downing
Mark Draeger
Richard Drake
Alan J. Dreher
Michael G. Duncan
Harold Dunkelberger
John Eckenrode
Craig D. Edwards
Gerald J. Egermier
Kenneth M. Eggleston
Robert D. Eicher
Glenn P. Eiden
John J. Elko
John M. Elliott
Charles Ellzey
Randy P. Engle
Charles A. Erickson, Jr.
Michael J. Ernst
C.D. Estep
David A. Everest
Gary K. Fach
George N. Fadduol
Vincent Falcone
Albert E. Faller, Jr.
Edward J. Faltin
William R. Farhat
Don H. Farmer
Thomas L. Faulkner
Michael Fawcett
Robert W. Ference
David P. Ferguson
Paul J. Fetonti
David E. Fettinger
William G. Fidler
Christopher Fiedler
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APPENDIX G

Title VII of the Civil Rights Act of 1964, as amended, §717, 42 U.S.C. §2000e-16 (1976)

Discriminatory practices prohibited; employees or applicants for employment subject to coverage

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Enforcement powers of Commission: issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsec-

tion (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

(b) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision

or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Section 2000e-5(f) through (k) of this title applicable to civil actions

(d) The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

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